(30,243)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 933

THE CITY OF NEWARK, THE CITY OF JERSEY CITY, AND THE STATE OF NEW JERSEY, APPELLANTS,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE PORT OF NEW YORK AUTHORITY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Praecipe.

1

United States District Court

District of New Jersey

[No. 4033—In Equity.]

THE CITY OF NEWARK, *Complainant-Appellant,*
THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY, *Intervenors-Appellants,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, *Defendants-Appellees.*

2

Sirs:

PLEASE TAKE NOTICE that the appellants, the City of Newark, the City of Jersey City and the State of New Jersey, propose that the following portions of the record in the above entitled cause and proceeding be included in the transcript upon the appeal of each of them from the order and decree made and filed herein on the 23rd day of February, 1923:

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1. This Praecipe.

1a. Citation.

2. Copy of Docket Entries.

3. The Bill of Complaint herein verified the 11th day of January, 1923.

4. The affidavits of Charles W. Staniford, Henry R. Lewis, F. J. Stillwaggon, Victor Geli-

4 neau and Thomas L. Raymond, all verified the 11th day of January, 1923, and the notice of motion for injunction during the pendency of this suit, dated January 11, 1923.

5. Petition of the State of New Jersey, by Thomas F. McCran, Attorney-General, for leave to intervene, and notice of motion for an order permitting the aforesaid State of New Jersey to intervene herein.

6. Petition and Notice of Motion for an order permitting the City of Jersey City to intervene in the cause, dated January 22, 1923.

5

7. Notice of Motion of defendant, The Central Railroad Company of New Jersey, for an order dismissing the Bill of Complaint.

8. Affidavit of William Leary, secretary of The Port of New York Authority, verified January 18, 1923, with exhibits annexed dated respectively July 27, 1922, August 26, 1922, September 8, 1922, and December 21, 1922.

9. Answer of the Port of New York Authority with exhibits annexed marked respectively "E," "F" and "G."

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9a. Opinion of the Court.

10. The decree entered herein on the 23rd day of February, 1923.

Praecipe

11. Petition for appeal.
12. Order allowing appeal.
13. Assignments of error.

Dated at Newark, New Jersey, March 3, 1923.

JEROME T. CONGLETON,
Solicitor for the City of Newark,
Complainant-Appellant.

THOMAS J. BROGAN,
Solicitor for the City of Jersey City,
Intervenor-Appellant.

THOMAS F. McCRAN,
Attorney General of the State of
New Jersey, Intervenor-Appellant.

To:

GEORGE T. CRANMER, Esq., Clerk of the United States District Court, District of New Jersey, Post Office Building, Newark, New Jersey.

GEORGE HOLMES, Esq., Solicitor for the Central Railroad Company of New Jersey, 33 Terminal Building, The Central Railroad Company of New Jersey, Jersey City, New Jersey.

JULIUS HENRY COHEN, Esq., Solicitor for Defendant Appellee, The Port of New York Authority, 111 Broadway, New York City.

Citation on Appeal.

By the Honorable CHARLES F. LYNCH,

One of the Judges of the District Court of the United States, for the District of New Jersey, in the Third Circuit:

To the Central Railroad Company of New Jersey, and the Port of New York Authority, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Third Circuit to be holden in the City of Philadelphia in the Circuit above named, on the 30th day of March, 1923, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the District of New Jersey, wherein the City of Newark, the City of Jersey City and the State of New Jersey are appellants, and you are appellees, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand in the City of Newark in the District and Circuit above named, this 20th day of March, in the year of Our Lord, One thousand nine hundred and twenty-three.

CHARLES F. LYNCH,
Judge of the District Court of the United States for the District of New Jersey, in the Third Circuit.

Docket Entries.

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UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity.]

CITY OF NEWARK, STATE OF NEW JERSEY, MAYOR and ALDERMEN OF JERSEY CITY

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and PORT OF NEW YORK AUTHORITY.

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Jan. 11,	1923	Bill of complaint filed.
" "	"	Subpoena issued.
" 12,	"	Notice of motion for Injunction filed.
" "	"	Affidavits on motion for Injunction filed (5).
" 18,	"	Notice of motion of Central R. R. Co. of N. J. to dismiss bill filed.
" 20,	"	Subpoena returned, served Jan. 12, and filed.
" 18,	"	Affidavit of Jerome T. Congleton filed. 15
" "	"	Certificate filed.
" 24,	"	Petition of State of New Jersey for leave to intervene filed.
" "	"	Notice of motion for leave to intervene filed.
" "	"	Order permitting the State of New Jersey to intervene filed.
" "	"	Petition for Mayor and Aldermen of Jersey City to intervene filed.

Docket Entries

16	Jan. 24, 1923	Order permitting Mayor and Aldermen of Jersey City to intervene filed.
	" " "	Affidavit filed.
	" " "	Answer of Port of New York Authority filed.
	" " "	Hearing on motion to dismiss bill.
	Feb. 15, "	Opinion filed.
	" 23, "	Notice of application for settlement of decree filed.
	" " "	Final Decree dismissing bill as to Central Railroad Company of New Jersey with costs filed.
17	" " "	Assignment of Errors filed.
	" " "	Appeal and allowances filed.
	" 24, "	Bond on appeal filed.
	" " "	Citation issued.
	" 26, "	Citation returned, service acknowledged. Copy filed.
	" " "	Acknowledgement of Service filed.
	Mar. 8, "	*Praecipe* of record on appeal filed.
	" 10, "	*Praecipe* of record on appeal filed.

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Notice of Motion.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[No. 4033—In Equity.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,

Defendants.

To the above-named Defendants:

PLEASE TAKE NOTICE, that upon the bill of complaint herein and the annexed affidavits of Charles W. Staniford, Henry R. Lewis, F. J. Stillwaggon, Victor Gelineau and Thomas L. Raymond, all verified the 11th day of January, 1923, a motion will be made by the undersigned, at a term of this Court to be held for the hearing of motions, in the Post Office Building, in the City of Newark, New Jersey, on the 17th day of January, 1923, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order restraining the defendant, The Central Railroad Company of New Jersey, its officers, agents and servants, and its or their successors and assigns during the pendency of this suit from proceeding with the construction of any bridge across the Newark Bay between the cities of Elizabeth,

22 New Jersey, and Bayonne, New Jersey; and for such other and further relief as may be just in the premises.

Dated, Newark, N. J., January 11, 1923.

Yours, etc.,

JEROME T. CONGLETON,
Solicitor for Complainant,
Office and Post Office Address,
City Hall,
Newark, New Jersey.

23

Complaint.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity—No. 4033.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
24 and THE PORT OF NEW YORK AUTHORITY,
Defendants.

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The City of Newark, by Jerome T. Congleton, its Corporation Counsel and Solicitor, complaining of The Central Railroad Company of New Jersey, and The Port of New York Authority, alleges:

Complaint

I.

Complainant is a municipal corporation existing under the laws of the State of New Jersey, having all the powers conferred upon it by the statutes of said state.

II.

The defendant, The Central Railroad Company of New Jersey, is a corporation existing under the laws of the State of New Jersey.

III.

The defendant, The Port of New York Authority, is a body corporate and politic, constituted under the laws of the States of New Jersey and New York and of the United States.

IV.

The City of Newark is the owner in fee of certain real estate and the riparian rights appurtenant thereto located in the City of Newark, in the County of Essex and State of New Jersey, on the westerly shore of Newark Bay, which is a navigable tidal body of water lying wholly within the State of New Jersey, the said real estate being more specifically described as follows:

Extending from the pierhead line along the west shore of Newark Bay westerly to Avenue A, and bounded on the north and south by lines parallel to and distant two thousand feet from the centre of Peddie Street, except at the northwest corner, where the boundary is the right of way of the New York Bay Railroad, containing about eleven hundred and fifty acres, *excepting* an area of about one hundred and thirty-six acres here-

tofore conveyed by The City of Newark to the United States Government.

Pursuant to certain acts of the Legislature of the State of New Jersey, approved October 21, 1907, Chap. 272; March 24, 1910, Chap. 47; April 16, 1912, Chap. 408; March 12, 1913, Chap. 70; April 23, 1915, Chap. 398; March 21, 1916, Chap. 249; March 19, 1917, Chap. 66; March 27, 1917, Chap. 152; and April 21, 1920, Chap. 331, The City of Newark has commenced and is engaged in prosecuting the work of improving said lands for transportation, shipping and industrial facilities and of establishing thereat a port terminal involving the construction of warehouses, piers, docks, bulkheads, slips, basins, ferries, docks and other facilities of commerce, known collectively as the Port Newark Terminal. In carrying out said project, The City of Newark has expended up to the present time the sum of about Six Million Five Hundred Thousand Dollars ($6,500,000), of which in excess of One Million Dollars ($1,000,000) has been expended in dredging Newark Bay. The said project contemplates that ocean going steamers and sailing craft engaged not only in intrastate but also in interstate and foreign commerce shall have free access to said terminal.

V.

For a number of years past The Central Railroad Company of New Jersey has maintained a double-track wooden bridge with bascule draws across the mouth of Newark Bay, below the City of Newark, between the City of Elizabeth in the County of Union and the City of Bayonne in the County of Hudson, State of New Jersey. This

bridge, which crosses the channel of Newark Bay at an angle of approximately 66°, has become and is a serious obstruction to the navigation of Newark Bay by vessels seeking the Port Newark Terminal, the said bridge having been constructed and maintained pursuant to an Act of the Legislature of the State of New Jersey, approved February 23, 1860, entitled "A further Supplement to an Act Entitled 'An Act to Incorporate the Somerville and Eastern Railroad Company,' passed February 26, 1847."

VI.

Recognizing the facts set forth in the last preceding paragraph, the said The Central Railroad Company of New Jersey has for several years past been seeking authority to construct a substitute bridge, constructed of masonry and steel with four tracks and vertical draws, upon substantially the same location as the said existing bridge. The City of Newark has objected to the construction of such substitute bridge and has maintained and does maintain that the proper development of the navigation of Newark Bay and of its Port Newark Terminal requires the removal of all bridges at the point aforesaid, and either the construction of a tunnel under the waters of Newark Bay at the point where the present bridge exists, or the rerouting of the said railroad of the said The Central Railroad Company of New Jersey along the westerly shore of Newark Bay.

VII.

In its efforts to secure authority for the construction of such new bridge The Central Rail-

road Company of New Jersey secured the passage by Congress of an act entitled "An Act To Authorize the Central Railroad Company of New Jersey to construct a bridge across the navigable waters of the Newark Bay, in the State of New Jersey," approved August 8, 1919 (41 U. S. Stats., 277), by which Act authority was granted to The Central Railroad Company of New Jersey to construct, maintain and operate a bridge and approaches thereto across Newark Bay in the State of New Jersey at a point suitable to the interests of navigation between the City of Elizabeth in the County of Union, and the City of Bayonne in the County of Hudson in said State in accordance with the provisions of the Act of Congress entitled "An Act To regulate the construction of bridges over navigable waters," approved March 23, 1906 (34 U. S. Stats., 84).

That it was in and by the said Act of March 23, 1906 (34 U. S. Stats., 84-86), in Section 6 thereof provided as follows:

> "That whenever Congress shall hereafter by law authorize the construction of any bridge over or across any of the navigable waters of the United States, and no time for the commencement and completion of such bridge is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the bridge authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act."

That the said The Central Railroad Company of New Jersey failed to commence the actual construction of the bridge authorized by said Act approved August 8, 1919, within one year from the

date of the passage of said Act, to wit: on or before August 8, 1920, and thereupon by force of the provisions in the Act above set forth on said 8th day of August, 1920, the authority granted to said Railroad Company by the Act of Congress approved August 8, 1919, did cease, expire and become null and void. 37

VIII.

That by an Act of Congress approved February 15, 1921 (41 U. S. Stats., 1099), more than six months after the authority granted to said The Central Railroad Company of New Jersey to construct a bridge as aforesaid had expired and become null and void as aforesaid, which act was entitled: "An Act To extend the time for the construction of a Bridge across the navigable waters of the Newark Bay, in the State of New Jersey," defendant sought to have Congress revive said expired and void authority by extending the time for the commencement and completion of the construction of the said bridge authorized by Act of Congress approved August 8, 1919, aforesaid, two and five years respectively, from the date of the approval of the said Act of 1921. The right to alter, amend or repeal said Act was expressly reserved by Congress. 38 39

Complainant avers that inasmuch as the original authority granted by Congress had expired and become null and void, there was no provision authorizing the construction of the said bridge within a specified time in existence on February 15, 1921, which time could be extended by the Act of February 15, 1921, and therefore the said Act of February 15, 1921, was inoperative and did not confer upon The Central Railroad Company of

New Jersey any right of construction or maintenance of a bridge.

IX.

Complainant further avers that by an Act of the Legislature of the State of New Jersey entitled "An Act to create the New Jersey Harbor Commission and to define its powers and duties," approved April 8, 1914, Chapter 123, a Commission was created to be appointed by the Governor to be known as the New Jersey Harbor Commission. Section 4 of the said Act provided among other things as follows:

> "All plans for the development of any water front upon any navigable water or stream of this state, or bounding thereon, which is contemplated by any person, corporation or municipality, * * * which involves the construction, change, alteration or modification of a * * * bridge, * * * shall first be submitted to the said Commission, and no such development or improvement enumerated within the provisions of this section, * * * shall be commenced or executed without the approval of this Commission first had and received, * * *. Any development or improvement * * * which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; * * *."

By an Act of the Legislature of the State of New Jersey entitled "An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all powers and duties now devolved, by law, upon the Board of

Riparian Commissioners, the Department of In- 43
land Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission," approved April 8, 1915, Chapter 242, a Department of Commerce and Navigation was established, the same to be governed by a board to be known as the Board of Commerce and Navigation upon which Board was devolved the powers conferred by the Act of 1914 aforesaid upon the New Jersey Harbor Commission.

Complainant further avers that pursuant to the provisions of the aforesaid statutes the said The Central Railroad Company of New Jersey on or about the 16th day of February, 1917, made 44
application to the said Board of Commerce and Navigation for the approval of its plans for the construction of a bridge on the site above mentioned to carry the main line of its railroad over Newark Bay together with detailed plans and specifications and other papers, which application after due consideration thereof on or about the 16th day of April, 1917, was denied by the said Board of Commerce and Navigation.

The Central Railroad Company of New Jersey thereafter and on or about the 12th day of June, 1918, made a new application to the said Board of 45
Commerce and Navigation for a permit to carry out the said work, which application also after due consideration thereof was on or about the 15th day of July, 1918, denied.

The said The Central Railroad Company of New Jersey on or about the 2nd day of February, 1922, made a further application to the said Board of Commerce and Navigation for a permit to carry out the construction and maintenance of its said bridge, which application also, after due

consideration thereof, was on or about the 19th day of June, 1922, denied; that the approval of said Board of Commerce and Navigation for the construction of the said bridge has never been obtained.

Complainant further avers that the said The Central Railroad Company of New Jersey has not complied with the provisions of the said Chapter 123 of the Laws of 1914 as amended by Chapter 242 of the Laws of 1915 of the State of New Jersey and that until it shall procure approval of its plans by the said Board and a permit therefor, any construction of said bridge or bridges thereon or the development or improvement in connection therewith is declared by law to be a purpresture and a public nuisance.

X.

Complainant further avers that pursuant to the authority of Chapter 154 of the Laws of 1921 of the State of New York and Chapter 151 of the Laws of 1921 of the State of New Jersey, an agreement was entered into between the States of New York and New Jersey by which there was created a district to be known as the Port of New York District, which embraces among other things all of the waters of Newark Bay, including the location of the existing and proposed new bridge of said The Central Railroad Company of New Jersey and there was furthermore created a body known as "The Port of New York Authority," defendant herein, consisting of six commissioners —three chosen by the State of New York and three by the State of New Jersey, having the powers and jurisdictions enumerated in said agreement, which agreement thereafter was rati-

fied by the Congress of the United States by a 49
Joint Resolution approved August 23, 1921 (42 U. S. Stats., 174), entitled:

"Public Resolution No. 17—67th Congress.

JOINT RESOLUTION.

"Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York."

50

That in and by the agreement or compact approved by Congress as aforesaid, on August 23, 1921, it was provided that the Legislatures of the two states prior to the signing of the said agreement or thereafter as soon as might be practicable, would adopt a plan or plans for the comprehensive development of the Port of New York. That thereafter a comprehensive plan for the development of the Port of New York, containing grants of power and authority to The Port of New York Authority to effectuate the same, was adopted and was approved by the State of New 51
York, by an Act approved February 24, 1922, being Chapter 43, Laws of 1922, and by the State of New Jersey by an Act approved February 23, 1922, known as Chapter 9 of the Laws of New Jersey of 1922, which compact was consented to by a joint resolution of Congress approved July 1, 1922 [42 U. S. Stats., 822], entitled:

"Public Resolution No. 66—67th Congress.

JOINT RESOLUTION.

"Granting consent of Congress and authority to the Port of New York Authority to exe-

52 cute the comprehensive plan approved by the States of New York and New Jersey by chapter 43, Laws of New York, 1922, and chapter 9, Laws of New Jersey, 1922."

Congress, by said joint resolution, "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution," gave its consent to the supplemental agreement between the States of New York and New Jersey aforesaid covering
53 the comprehensive plan for the development of the Port of New York embraced in the said statutes, and authorized and empowered said Port of New York Authority to carry out and effectuate the same.

The said comprehensive plan provided for the construction of certain tunnels and bridges to form part of the plan. It also provided for the construction of certain belt lines, including a belt line known as "Middle Belt Line," to connect New Jersey and Staten Island and the railroads on the westerly side of the port with Brooklyn, Queens, the Bronx and the railroads on the east-
54 erly side of the Port.

XI.

It was provided in Article 13 of the compact between the State of New York and the State of New Jersey aforesaid that:

> "The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, State or local au-

thority, administrative, judicial, or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article 10 for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port" (42 U. S. Stats., 178). 55 56

In and by the comprehensive plan approved as aforesaid it was further provided that:

"Section 8. The port of New York authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the Congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department, and the United States Shipping Board, for suitable assistance in carrying out said Plan. * * * It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said 57

58 plan. All municipalities within the district are hereby authorized and empowered to co-operate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to co-operate. * * * The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, * * *." (N. Y. Laws 1922, c. 43; N. J. Laws 1922, c. 9.)

59 The Joint Resolution of Congress aforesaid, approved July 1, 1922, referred to and approved the bridges, tunnels and belt lines forming the comprehensive plan which were generally and in outline indicated on the maps filed by The Port of New York Authority in the offices of the Secretaries of the States of New York and New Jersey and were in said Joint Resolution described in outline.

XII.

60 That the existing bridge of the said The Central Railroad Company of New Jersey and the proposed new bridge to be constructed by it are not made a part of the comprehensive plan authorized by the said compact and said resolution, and are not shown on said comprehensive plan, but are in conflict therewith, obstructive thereof and inimical thereto.

Complainant further avers that the defendant, The Central Railroad Company of New Jersey, has not secured the consent or approval of the defendant, The Port of New York Authority, for the construction of the said proposed bridge, and that said bridge cannot lawfully be constructed without such consent or approval.

XIII.

That complainant is informed and believes and therefore avers that the said The Port of New York Authority has informed the Secretary of War that if a large capital expenditure be now made such as is proposed in the construction of the said new bridge by the said The Central Railroad Company of New Jersey, it would tend to fasten upon Newark Bay perhaps for years the operating conditions entailed by such bridge, and thus impose for an indefinite period in the future serious limitations on the development of the marine possibilities of the Port; that the Engineers of the said The Port of New York Authority in studying the problem of the Port and in framing the Comprehensive Plan aforesaid, expressly excluded from the development of such plan any bridge at the point aforesaid, because such a bridge would constitute an obstacle to the proper development of the Port of New York.

Complainant is informed and believes and therefore avers, that the said The Port of New York Authority not only has not authorized the construction of the said proposed new bridge of the said The Central Railroad Company of New Jersey, but is unwilling to authorize the same.

XIV.

Complainant further avers that neither the maintenance of the present bridge nor the construction of the proposed new bridge is necessary to the proper maintenance and operation of the railroad of the said The Central Railroad Company of New Jersey. The said Railroad Company owns and operates a line of railroad diverging from near the point where it reaches the

64 said present bridge at Elizabethport, New Jersey, along the westerly shore of Newark Bay, northward to a point in the City of Newark opposite the confluence of the Passaic and Hackensack Rivers, where it runs over another bridge owned by the said railroad company across the mouths of the said Passaic and Hackensack Rivers above the portion of Newark Bay navigable by ocean going vessels. This branch of the defendant railroad proceeds from the eastern end of the said bridge until it intersects with its present line leading from Bayonne to Communipaw. Com-
65 plainant avers that the line of the defendant railroad operating across the mouths of the Passaic and Hackensack Rivers is adequate for the needs of the said railroad company without the construction and maintenance of the proposed new bridge.

XV.

Complainant therefore on information and belief alleges that the construction of the said proposed new bridge by The Central Railroad Company of New Jersey not only would be an unlawful purpresture but would constitute an insuper-
66 able obstacle to the proper carrying out of the comprehensive plan for the development of the New York Port District, and would seriously interfere with the development of the Port Newark Terminal in which complainant has a large pecuniary investment and upon the further development of which is dependent the reception by it of any adequate return upon such investment.

XVI.

Complainant further avers that because of the threatened construction of the said new bridge

it has been unable to secure tenants of the property owned by it at the said Port Newark Terminal, that parties negotiating with it for dock, pier, warehousing and other facilities have refrained from completing such negotiations because of the threatened construction of said proposed bridge. 67

XVII.

Complainant further avers that on or about the 29th day of December, 1922, the Secretary of War and the Chief of Engineers purporting to act pursuant to authority in them vested by acts of Congress, approved the plans of the said The Central Railroad Company of New Jersey for a new bridge across the south end of Newark Bay replacing the existing bridge at that point. Complainant avers that such action was arbitrary, and is informed and believes that such action is wholly void and without authority in law because of the matters and things herein set forth. Complainant further avers that such action and the acts of Congress upon which the said Secretary of War and said Chief of Engineers purported to rely were and are in violation of the rights guaranteed to it by the Fifth Amendment to the Constitution of the United States, and constitute an attempted usurpation of the powers reserved in the Constitution of the United States to the States respectively, or to the people, and are therefore in violation of the Tenth Amendment to the Constitution of the United States, so that said Acts of Congress conferred upon the said Secretary of War and said Chief of Engineers no authority to take the action aforesaid in regard to said proposed bridge. 68 69

70 XVIII.

Complainant further avers that if the said proposed bridge, or any bridge, between the said cities of Bayonne and Elizabeth, be constructed, the free and unobstructed access of river and ocean going vessels to the wharves, docks, and other facilities of its Port Newark Terminal will be prevented and the value of said Terminal to complainant destroyed; and that the authority purported to be given to defendant The Central Railroad Company of New Jersey by the Acts of Congress of August 8, 1919, and
71 February 15, 1921, and by the said action of the Secretary of War and the Chief of Engineers is null and void and in disregard of complainant's rights under the Fifth Amendment to the Constitution of the United States.

XIX.

Complainant further avers that defendant The Central Railroad Company of New Jersey has already commenced the construction of said new bridge under the pretended authority of the permit issued by the Secretary of War above re-
72 ferred to; that in case it shall proceed with such construction the rights and property of complainant will be irreparably injured as above set forth and that complainant can have redress only in a Court of Equity to which jurisdiction in such behalf rightfully appertains.

XX.

Complainant further avers that the matter in controversy exceeds the sum of Three thousand dollars ($3,000), exclusive of interest and costs.

WHEREFORE, complainant prays: 73

1. That writs of subpoena issue directed to defendants The Central Railroad Company of New Jersey and The Port of New York Authority, commanding each of them to appear herein and answer, but not under oath (oath being expressly waived), the allegations contained in the foregoing Bill of Complaint, and abide by and perform such orders and decrees as the Court may make in the premises.

2. That the Court adjudge that by reason of its direct pecuniary interest this complainant is entitled to maintain this suit to enjoin and restrain 74
the threatened construction of a bridge by the defendant The Central Railroad Company of New Jersey, as hereinbefore set forth.

3. That the Court adjudge that The Central Railroad Company of New Jersey is without right or power to construct the proposed new bridge at or near the site occupied by its present bridge over the waters of Newark Bay and that the threatened construction thereof would constitute an unlawful purpresture and a public nuisance.

75

4. That the Court adjudge the Acts of Congress approved August 8, 1919, and February 15, 1921, to be in violation and contravention of the rights of this complainant because not authorized by, but in violation of the Constitution of the United States and the Amendments thereof.

5. That the Court adjudge the construction of said bridge without the permission of the said The Port of New York Authority and/or of the

76 Board of Commerce and Navigation of the State of New Jersey to be unlawful and void.

6. That, temporarily pending this suit, as well as permanently, the defendant The Central Railroad Company of New Jersey, its officers, agents and servants, and its or their successors and assigns, be enjoined and restrained from proceeding with the construction of the said bridge and that an injunction be granted herein forever enjoining and restraining the said defendant, its officers, agents and servants, and its or their successors and assigns, from proceeding with such construc-
77 tion.

7. That this complainant have such other or further relief as may be meet and agreeable to equity.

JEROME T. CONGLETON,
Corporation Counsel and Solicitor
for Complainant,
Office and Post Office Address City Hall,
Newark, N. J.

GEORGE W. WICKERSHAM,
Of Counsel.

78 UNITED STATES OF AMERICA,
District of New Jersey, } ss.:

JEROME T. CONGLETON, being duly sworn, deposes and says that he is Corporation Counsel of the City of Newark and in charge of the proceedings herein; that he has read the foregoing bill of complaint and is familiar with the contents thereof; that the matters and things therein set forth, so far as they relate to the acts and deeds of the City of Newark, are true, and, so

far as they relate to the acts and deeds of others, he believes them to be true. 79

JEROME T. CONGLETON

Sworn to before me this 11th day of January, 1923.

C. HUBERT DERIVAUX
A Notary Public of New Jersey

[NOTARIAL SEAL]

Affidavit of Charles W. Staniford, Read on Behalf of Appellants. 80

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY *et al., Defendants.*

81

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.:

CHARLES W. STANIFORD, being duly sworn, says:

1. That he is a consulting engineer having an office at No. 30 Church Street, in the City of New York; that for thirteen years, to-wit: from 1906 to 1919, he was Chief Engineer of the New York Dock Department; that he is a member, and was formerly Director, of the American Society of

82 Civil Engineers; that since 1919 he has practiced his profession as a consulting engineer and has specialized in harbor and terminal work and railroad and tunnel survey and construction; that he has had extensive experience in the laying out of bulkhead and pierhead lines, and in measuring river and harbor currents and in designing docks, wharves, slips and terminal facilities.

2. That he has, as Resident or Division Engineer, personally planned and built three tunnels, one on the South Pennsylvania Railroad, and two on the Louisville & Nashville Railroad. As Chief
83 Engineer of the New York City Dock Department for 13 years he was in constant close connection with the design, construction and maintenance of practically all tunnels entering Manhattan Island. It was his duty during this period to collaborate with the engineers in charge of the construction of all tunnels affecting the City's piers, bulkhead walls, and ferry houses, and to approve the plans in so far as they affected the said property of the City of New York and to follow closely the work of construction in the same regard.

3. That he has personally examined and is
84 familiar with the topography in the neighborhood of the Kill Van Kull, Shooter's Island, Newark Bay, and the shore line of the cities of Bayonne, Elizabeth and Elizabethport, New Jersey; that more especially, he is familiar with the exact position of an existing two-track wooden bridge with bascule draw now in use by the defendant, The Central Railroad Company of New Jersey, between the cities of Bayonne and Elizabeth, New Jersey. That ocean going vessels having passed through that portion of New York Harbor known

as the "Narrows" can only approach Newark Bay 85
and the Passaic and Hackensack Rivers by proceeding through a strait of water known as the Kill Van Kull, separating Bayonne, New Jersey, from Staten Island, New York; that vessels having proceeded through the Kill Van Kull are compelled to verge immediately to the north to avoid Shooter's Island and the shoals in the vicinity thereof, and having so verged to the north come immediately upon the existing bridge of the defendant Railroad Company between the cities of Bayonne and Elizabeth, New Jersey; that a vessel in approaching the draw in the aforesaid bridge, 86
being met with strong river currents, bearing down from the north, is unable to come to rest and, if the dangers of grounding or collision are to be avoided, must necessarily proceed northward and pass through the bridge, so as to avoid the possibility of being driven south on to the shallows surrounding Shooter's Island, or of being swung around so as to be parallel with the bridge; that this circumstance renders the approach to the said drawbridge of peculiar difficulty and danger to navigators, and that only under favoring circumstances is it possible to steer with safety and accuracy into the channel afforded by 87
the aforesaid drawbridge.

4. That if the difficulties and dangers attendant upon a safe passage through the aforesaid drawbridge are not successfully met, and the vessel so attempting to pass through is driven into collision with the aprons or other parts of the said drawbridge, the result is completely to close the approach to Newark Bay from the sea; that, however, on such occasions The Central Railroad Company of New Jersey is not seriously ham-

88 pered, even though this drawbridge may be kept open due to the grounding or other impeding of the progress of a vessel through the said drawbridge, the said Company having an alternative mode of approach to its terminals in the cities of Jersey City (Communipaw Section) and Bayonne, New Jersey, by diverting its trains from a point in Elizabethport northward through Newark and over the bridge used by the Newark & New York Branch of the said Railroad over the Passaic and Hackensack Rivers above the Port Newark Terminal.

89 5. That deponent has made a special study of the possibilities of doing away with the existing situation and the existing difficulties in the way of approach to Port Newark Terminal on the part of the ocean going vessels. That the said difficulties and obstructions may be done away with by any one of four methods:

(1) A tunnel might be constructed between the cities of Bayonne and Elizabeth, New Jersey, with a sufficiently easy grade to permit of the operation of trains through it by means of steam engines, the cost of a tunnel so constructed not being in
90 excess of $29,000,000.00.

(2) That a tunnel for operation with electric engines or cars having a grade not exceeding 2.09 per cent. and a length not exceeding 8,450 feet could be constructed by any one of the following methods at the estimated cost set forth opposite each:

Shield with concrete block....	$22,829,000.00
Ordinary shield method.....	26,209,000.00
Open trench method.....	28,191,000.00

The aforesaid figures include the cost of electrification through the tunnel. Deponent believes that the delay to trains due to the necessity of coupling and uncoupling of electric engines would not exceed an average of 12 minutes per train. 91

(3) At an expenditure of $14,275,000, a method could be worked out for doing away with either a bridge or tunnel at the point in question, by re-routing passenger trains north from Elizabethport, through Newark, over the bridge over the Passaic and Hackensack Rivers, now operated by the Newark & New York Branch of the defendant railroad, into its present passenger terminal, and 92
by re-routing freight trains over this same bridge, a new connecting line to be built connecting the eastern end of said bridge with the entrance to the Communipaw Freight Yard at Chapel Avenue in Jersey City. Such a method of obviating the difficulty would cause an increase in the running time of freight trains to the Chapel Avenue Terminal (assuming their average speed to be 15 miles per hour) of 9.76 minutes, the additional mileage being 2.44 miles; and would increase the running time of passenger trains (assuming their average speed to be 30 miles per hour) by 1.10 minutes, the additional mileage being 0.6 miles—these increases in running time being duly capitalized and included in the foregoing estimate of the cost of this method. 93

(4) That a fourth method of doing away with the difficulty and obstruction caused by the existing bridge would be for the defendant railroad to re-route its traffic from Elizabethport to the Oak Island Yard of the Lehigh Valley Railroad and Pennsylvania Railroad; thence across Newark Bay, parallel with the existing bridge maintained

94 above Port Newark Terminal by the Lehigh Valley Railroad and Pennsylvania Railroad to the entrance of the Communipaw Yard at Chapel Avenue, Jersey City. This method would increase the running time of freight trains (assuming their average speed to be 15 miles per hour) by 4.44 minutes, the increased distance to be traversed being 1.11 miles, and would increase the running time of passenger trains (assuming their average speed to be 30 miles per hour) by 1.10 minutes, the increased mileage of passenger trains being 0.6 miles; that the cost of this method, including proper capitalization of the
95 delays in running time, would be $16,782,000.00.

An alternative under the fourth method herein would be to construct a connecting line following method No. 4 from Elizabethport to the east end of the proposed Newark Bay Bridge, parallel to the Lehigh-Pennsylvania Bridge, thence diverting north along the east side of Newark Bay to an intersection with method No. 3, near the Hudson County Boulevard, then following method No. 3 to the entrance to the Communipaw Yard at Chapel Avenue, Jersey City; such a method would increase the mileage for freight trains by 1.47
96 miles and their running time 5.88 minutes, and would increase the mileage for passenger trains by 0.6 miles and their running time by 1.10 minutes. The cost of this method, with due capitalization of the increased running time, is estimated at $21,679,000.00.

6. That all of the foregoing estimates of costs are of necessity only approximate, but have been reached by deponent after careful detailed calculations with due allowance for all elements which deponent, from his practical experience as

an engineer, knows should be reckoned with in such undertakings. 97

CHAS. W. STANIFORD.

Sworn to before me this 11th day of January, 1923.

FREDERICK T. FROST, Notary Public. Kings Co. No. 31, Kings Co. Register's No. 4027; Certificate filed N. Y. Co. No. 52; N. Y. Co. Register's No. 4061; Commission expires Mar. 30, 1924.

[NOTARIAL SEAL]

98

Affidavit of Henry R. Lewis, Read on Behalf of Appellants.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

CITY OF NEWARK, *Complainant,*

against

CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al.*, *Defendants.*

99

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

HENRY R. LEWIS, being duly sworn, deposes and says:

1. That he is the Operating Manager of the Trans-Marine Corporation, having his office at Port Newark, New Jersey, one of his duties being to advise incoming and outgoing vessels as to

100 conditions prevalent in Newark Bay in the vicinity of and just below the Port Newark Terminal; that he has had thirty-three years of service at sea and for nineteen years was the master of various vessels owned and operated by the International Mercantile Marine Co.

2. That as such Operating Manager he has spent between two and three weeks in making a detailed examination of tidal conditions, river and channel currents, etc., in the vicinity of Port Newark Terminal, with particular regard for conditions to be met by ocean-going vessels proceeding
101 from New York Harbor to Port Newark Terminal and from Port Newark Terminal to the open ocean, that his method has been to employ a small motorboat in order to make the most direct examination possible of navigating conditions between Port Newark Terminal, above the present drawbridge of the defendant Railroad Company, between Bayonne, New Jersey, and Elizabeth, New Jersey, and the Kill Van Kull and Staten Island Sound, which are the only two straits of water through which ocean traffic can approach the aforesaid Port Newark Terminal.

102 3. That the mode of approach to Port Newark Terminal employed by the majority of incoming ocean or coastwise vessels is through the Kill Van Kull, thence between the southerly shore of a certain headland, known as Bergen Point, on which is built the City of Bayonne, New Jersey, and the island at the western end of the said Kill Van Kull, known as Shooter's Island; and that between these two areas of land the navigable passage is two hundred feet in width.

4. That after passing through said passage and verging toward the north in order to approach the drawbridge of the defendant Railroad Company, between Bayonne, New Jersey, and Elizabeth, New Jersey, vessels are unable to pause to await the opening of the drawbridge because of the following circumstances: Practically all vessels which approach the Port Newark Terminal are single screw vessels; a single screw vessel, whose screws revolve to the right (as is generally the case), is unable to hold its position in any body of flowing water (by the usual means of slowly revolving the screw) without a dragging of the stern to the port side of the vessel; the effect of such dragging is to make the vessel approach a position parallel with the existing drawbridge, which does not cross the channel of Newark Bay at right angles, but at an angle of about 66 degrees; the result, therefore, is that (unless the vessel makes fast to at least two tugs—a proceeding which involves an average cost to each vessel for the passage in and out of about $400, the cost being greater if tidal conditions make a departure between 5 P. M. and 7 A. M. necessary) a safe passage through said draw is only possible when the vessel is permitted to approach it without stopping, conditions which rarely, if ever, prevail in the case of a drawbridge over which trains are operated at close intervals. 103 104 105

5. To reduce the difficulties resulting from the foregoing conditions, vessels approaching Port Newark Terminal are of necessity compelled to approach it only at slack water, that is to say, at a moment when there is no tide movement. If the draw were approached upon the rising of the tide, the drifting of the vessel into the parallel position

106 described above would be unavoidable; if a vessel were to approach the draw upon the falling tide a delay due to the passage of a train or trains might last a sufficient time for the falling of the tide to cause the nose of the vessel to run aground, with the attendant possibility that the vessel would break in two, the nose being aground while the stern would be afloat. A vessel so stranded has no chance of being floated until the return of high tide. The period of slack water favorable to the movement of vessels lasts approximately twenty minutes at high tide and approximately the same length of time at low tide.

107 6. Vessels departing from Port Newark Terminal cannot go out on a receding tide because if, after the vessel has left its dock, the passage of a long, slow-moving freight train were to delay the opening of the draw, it would be impossible to hold the vessel against the tide movement and impossible to prevent a collision between the vessel and the closed bridge. Vessels, therefore, must depart from Port Newark Terminal upon an incoming tide in order to navigate the draw safely. At certain seasons of the year a departure is

108 fraught, even under these circumstances, with unusual dangers, for during the late winter months and during the Spring of the year, freshets in the waters of the Passaic and Hackensack Rivers make the retarding effect of the incoming tide almost negligible, so that the vessel is in almost as dangerous a position as it would be if it were to start out upon an ebb tide. The late Winter and Spring freshets, moreover, produce a situation of peculiar danger to vessels, because there is at such times one movement upon the surface of the water, i. e., down-stream, and another move-

ment in the waters underneath the surface of the water, i. e., up-stream, making the navigation of a vessel, at best, little more than a matter of guesswork. 109

7. That the height of the masts with which seventy-five per cent of the lighters operated in connection with the vessels of the Trans-Marine Corporation between Port Newark Terminal and New York Harbor points are equipped, is such that these lighters cannot pass under the proposed bridge of The Central Railroad Company of New Jersey (the fixed portions of which deponent is informed are to have a clearance of but 35 feet above mean high water), unless the draw is opened. 110

8. The existing drawbridge is the cause of a substantial increase in insurance rates in policies covering vessels which propose to use the Newark Terminal because: (1) the risk of loss of time to the vessel from grounding is greatly increased; (2) the likelihood of damage to the vessel from grounding is greatly increased; (3) the chances of causing damage to railroad property by drifting vessels is unusually great.

H. R. LEWIS 111

Sworn to before me this 11th day of January, 1923.

RUSSELL STILES
Notary Public for Westchester County

[NOTARIAL SEAL]

Certificate filed in N. Y. County
N. Y. Co. Clerk's No. 774. N. Y. Co. Reg. No. 4633
My commission expires March 30, 1924.

112 **Affidavit of F. J. Stillwaggon, Read on Behalf of Appellants.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, *Defendants.*

113

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF NEW YORK, } ss.:

F. J. STILLWAGGON, being duly sworn, deposes and says:

1. That he is a pilot engaged in the piloting of vessels in New York Harbor and its environs; that he has piloted vessels in and out of Newark Bay for over 30 years past, and is entirely familiar with the conditions in said Bay.

114 2. That the present bridge of the Central Railroad Company of New Jersey between Bayonne and Elizabeth, New Jersey, has bascule draws of a width of about 85 feet. A bascule draw is a draw which opens like a pen knife, so that when the said draw is open there is no limit to the height of vessels which may pass through it. The navigation of ocean going vessels through the present draw is extremely precarious because of the difficulty of holding vessels while waiting for the draw to open, and because of tidal conditions. It is necessary to have the assistance of tugs in

taking vessels through the draw, and even with these tugs it is impossible to pass through the draw if there is a heavy wind. 115

3. That he is informed that the proposed new bridge of the Central Railroad Company of New Jersey is to have a vertical draw with a clearance of 135 feet above mean high water when open. A draw of this type rises in a horizontal position, and when it is fully open vessels whose masts do not exceed 135 feet above mean high water in height may pass through; vessels with higher masts may not unless they are equipped with folding masts or hinged masts. 116

A great many of the ocean going cargo vessels entering New York Bay are equipped with masts exceeding 135 feet in height above mean high water, and none of them has folding or hinged masts, so far as he is informed.

4. That up to the present time he has only known of one vessel whose masts exceeded the height mentioned passing through the present bridge of the Central Railroad Company of New Jersey, but in the future development of Newark Bay he believes that there will be many such. The vessel which is mentioned as having passed through the draw of the present bridge could not pass through the proposed bridge. That he regards the construction of any bridge which imposes a limitation upon the mast height of vessels passing through it as a serious impediment to the development of Newark Bay. 117

5. That he is informed that the proposed bridge of the said company is to have a clearance of 35 feet above mean high water. It would therefore not be necessary to open the draw of the pro-

118 posed bridge for any vessel whose mast height did not exceed such 35 feet. This class would include scows without masts or booms, and most tugs. A large part of the traffic in Newark Bay however consists of steam lighters and barges. Practically all barges have booms running from 35 feet above mean high water up, and sticks from 65 feet up. No steam lighter that he knows of could pass under a 35-foot clearance. It would be therefore necessary to open the proposed bridge for all barges and steam lighters as well as larger vessels. The draw would therefore be
119 open constantly even under the present conditions in Newark Bay, and as the development of the said Bay increases, he is of opinion that there would be most serious conflict between the interests of The Central Railroad Company of New Jersey in seeking to have its trains pass over the said bridge, and the interests of persons wishing to pass up or down Newark Bay in vessels.

F. J. STILLWAGGON

Sworn to before me, this 11th day of January, 1923.

120 [NOTARIAL SEAL] FREDERICK T. FROST, Notary Public. Kings Co. No. 31. Kings Co. Register's No. 4027; Certificate filed N. Y. Co. No. 52; N. Y. Co. Register's No. 4061; Commission expires Mar. 30, 1924.

Affidavit of Victor Gelineau, Read on Behalf of Appellants. 121

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants. 122

UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY, } ss.:

VICTOR GELINEAU, being duly sworn, deposes and says that he is the Director of the Board of Commerce and Navigation of the State of New Jersey; that The Central Railroad Company of New Jersey has made three applications before the said Board for permission to construct a bridge over the Newark Bay between Bayonne, New Jersey, and Elizabeth, New Jersey. Said applications were made on February 16, 1917, 123
June 12, 1918, and February 2, 1922. Deponent has the custody of the records of said Board and is familiar with the proceedings that were taken upon said applications.

The said applications were denied on April 16, 1917, July 18, 1918, and June 19, 1922, respectively.

Deponent further says that no permit or approval of the said Board has been given to the Central Railroad Company of New Jersey for

124 the construction of any bridge at the site above mentioned.

VICTOR GELINEAU.

Sworn to before me this 11th day of January, 1923.

[NOTARIAL SEAL] WILLIAM H. BEARDSLEY
Notary Public for New Jersey

Affidavit of Thomas L. Raymond, Read on Behalf of Appellants.

125 UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

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126 UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, } ss.:

THOMAS L. RAYMOND, of full age, being duly sworn according to law, on his oath deposes and says:

1. That he is the Director of the Department of Streets and Public Improvements of the City of Newark, a municipal corporation of the State of New Jersey, and as such the care, custody and control of the Port Newark Terminal Develop-

ment for transportation, shipping and industrial facilities in the City of Newark on the westerly shore of Newark Bay is imposed upon him by law. 127

2. That he has been such Director of the Department of Streets and Public Improvements since November 20th, 1917, and that prior to said date, from January 1st, 1915, he was the Mayor of the City of Newark.

3. That the Port Newark Terminal of the City of Newark is located about two miles north of the present bridge of the Central Railroad Company of New Jersey, across the mouth of Newark Bay between the Cities of Elizabeth in the County of Union and Bayonne in the County of Hudson, New Jersey. 128

4. That the City of Newark in 1907, through its then Board of Street and Water Commissioners, the body charged by law with the establishment of docks and shipping facilities, pursuant to the provisions of Chapter 272 of the laws of New Jersey for the year 1907 designated the following described area in the Newark Great Salt meadows for the purpose of establishing and maintaining a system of public docks and shipping facilities comprising about 1100 acres in area, and being more particularly described as follows: extending from the pierhead line along the west shore of Newark Bay westerly to Avenue A. and bounded on the north and south by lands parallel to and distant 2,000 feet from the center of Peddie Street, except at the northwest corner, where the boundary is the right of way of the New York Bay Railroad. 129

130 5. That for seven years thereafter the City of Newark acquired from time to time, by purchase or condemnation property within the zone development thus established, by parcel, until in 1914 the city had acquired the major portion of the land in said area.

6. On January 1st, 1914, this deponent is informed and believes the work of developing the said area for docks and shipping facilities was commenced by the City and in 1916 an area of approximately 300 acres had been reclaimed with material dredged from an inland channel 400 feet
131 wide and 20 feet deep, connecting with the Government channel in the Bay, and a marginal dock was constructed along the entire north side of the inland ship channel dredged by the City of Newark.

7. With the entrance of this country into the World War in 1917 the Federal Government took over from the City of Newark a portion of this developed property, namely, 136 acres located between Doremus Avenue and the right of way of the Elizabethport branch of The Central Railroad Company of New Jersey, for use as an Army
132 Supply base, first leasing the property from the City with an option to purchase which was subsequently exercised by the Federal Government after the signing of the Armistice; the deed of conveyance by the City of Newark to United States of America, however, contained a reservation giving to the City the prior right of repurchase in event of sale of the same by the United States of America. About the time of making said lease with the Federal Government the City leased the remainder of its then developed prop-

erty between Doremus Avenue and the shore of 133
Newark Bay to the United States Shipping Board Emergency Fleet Corporation, comprising an area of about 113 acres including streets. Upon these two areas the Federal Government, or its agencies, during the war constructed warehouses and a shipyard, together with the necessary appurtenances, at a cost of many millions of dollars. This deponent is informed and believes that the dock serving the army base and shipyard is 7,000 feet in length, is equipped with cargo handling machinery and has rail connections with the Pennsylvania Railroad, the Central Railroad of 134
New Jersey and the Lehigh Valley Railroad systems, and there is a fully equipped belt line railroad serving these two areas known as the Atlantic Port Railroad Company.

8. Up to November 30, 1922, the City of Newark had acquired about 1,200 acres of land in this development zone and immediately contiguous thereto, together with the riparian grants from the State of New Jersey for a distance of 4,000 feet along the westerly shore of Newark Bay, and has expended about $6,500,000 on account of this public improvement. 135

9. During 1921, a thirty foot channel, 200 feet wide from Kill Van Kull to a point 1,000 feet in shore in the ship channel of said Port Newark Terminal, was completed at a cost of about $1,000,000 to the City of Newark, which work was done by the City at its own expense with the consent of the Federal Government and the State of New Jersey. The City of Newark has also just completed the construction of a bulkhead 4,400 feet in perimeter, extending out into Newark Bay

136 from the old shore line on the south side of the ship channel whereby an area of 70 acres of mud flats which were under water have been reclaimed, and directly west of this bulkhead area the City of Newark has reclaimed approximately 250 additional acres of land. That in November, 1922, the City of Newark let a contract for the widening of a portion of the said ship channel from 200 feet to the entire width of 670 feet, involving a cost of about $135,000. This work is now under way. That in December, 1922, the City let a contract for the building of a portion of a new dock in the
137 said Terminal at a cost of about $200,000.

10. Railway service to the Port Newark Terminal is furnished by five trunk lines. Immediately adjoining the entire Port area on the north is the property of the Pennsylvania Railroad, where there is being constructed the largest freight classification yard in the world as this deponent is informed and believes. Next to this, to the north, is the present Oak Island yard of the Lehigh Valley Railroad. The trackage of both of these roads is used by the Baltimore & Ohio, and the Philadelphia & Reading Railroads. Cutting across the entire property
138 zone of the Port Newark Terminal running north and south, is the Elizabethport branch of the Central Railroad Company of New Jersey, which also has a large classification yard.

11. That the City of Newark has up to the present time expended as aforesaid a large sum of money to develop this Port Newark Terminal, and has dredged a 30 foot channel in Newark Bay from Kill Van Kull in order to make the terminal avail-

able for ocean going shipments as a relief from 139
the present congested conditions existing in New York Bay, and has therefore objected to substitution by The Central Railroad Company of New Jersey of a new bridge in place of the existing bridge across Newark Bay, and has maintained and does maintain that the proper development of the navigation of Newark Bay in connection with the said Port Newark Terminal for the deep water navigation it is designed to accommodate, requires removal of all bridges including the present as well as the proposed new bridge of the Central Railroad Company of New Jersey, below 140
the Newark development, and that a practical alternative for any bridge across Newark Bay at the proposed location, would be either the construction of a tunnel under the waters of Newark Bay at a point where the present bridge exists or a re-routing of the railroad of The Central Railroad Company of New Jersey along the westerly shore of Newark Bay.

12. That the City of Newark has consistently protested against the efforts of the Central Railroad Company of New Jersey to secure permission to substitute a new bridge for its present 141
bridge across Newark Bay between the cities of Elizabeth and Bayonne; before the Board of Commerce and Navigation of the State of New Jersey which disapproved of the application made to it for that purpose by the Railroad Company, before the District Engineer of the Port of New York, the Chief of Engineers of the War Department and before the Secretary of War.

142 13. Attached hereto and made a part hereof are the following: A map prepared by the City of Newark showing the location of Port Newark Terminal and its environs, and an aerial photograph of the same marked respectively Exhibits "A" and "B."

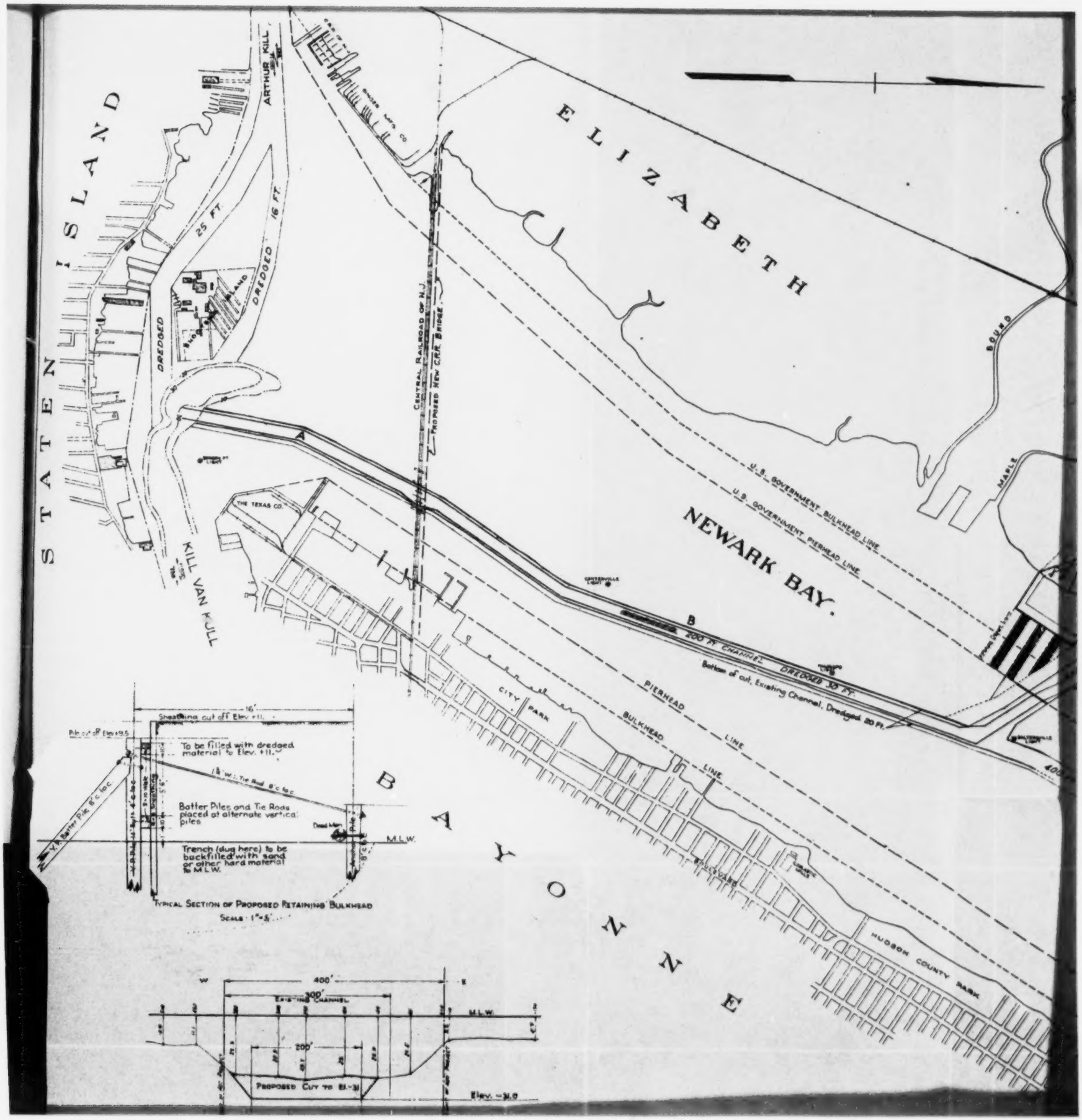
THOMAS L. RAYMOND.

Sworn and subscribed to before me,
this 11th day of January, 1923.

[NOTARIAL SEAL] JOSEPH G. WOLBER
A Notary Public of New Jersey

143

144


STATEN ISLAND
ELIZABETH
ARTHUR KILL
DREDGED 25 FT.
DREDGED 16 FT.
KILL VAN KULL
CENTRAL RAILROAD OF N.J.
PROPOSED NEW C.R.R. BRIDGE
THE TEXAS CO.
U.S. GOVERNMENT BULKHEAD LINE
U.S. GOVERNMENT PIERHEAD LINE
NEWARK BAY.
200 Ft. CHANNEL DREDGED 30 FT.
Bottom of cut, Existing Channel, Dredged 20 Ft.
PIERHEAD LINE
BULKHEAD LINE
CITY PARK
BAYONNE
HUDSON COUNTY PARK
MARLE
Sheathing cut off Elev. +11.
To be filled with dredged material to Elev. +11.
Batter Piles and Tie Rods placed at alternate vertical piles
Trench (dug here) to be backfilled with sand or other hard material to M.L.W.
M.L.W.
TYPICAL SECTION OF PROPOSED RETAINING BULKHEAD
SCALE: 1"=5'
400'
300'
EXISTING CHANNEL
200'
PROPOSED CUT TO EL.-31
Elev. -31.0

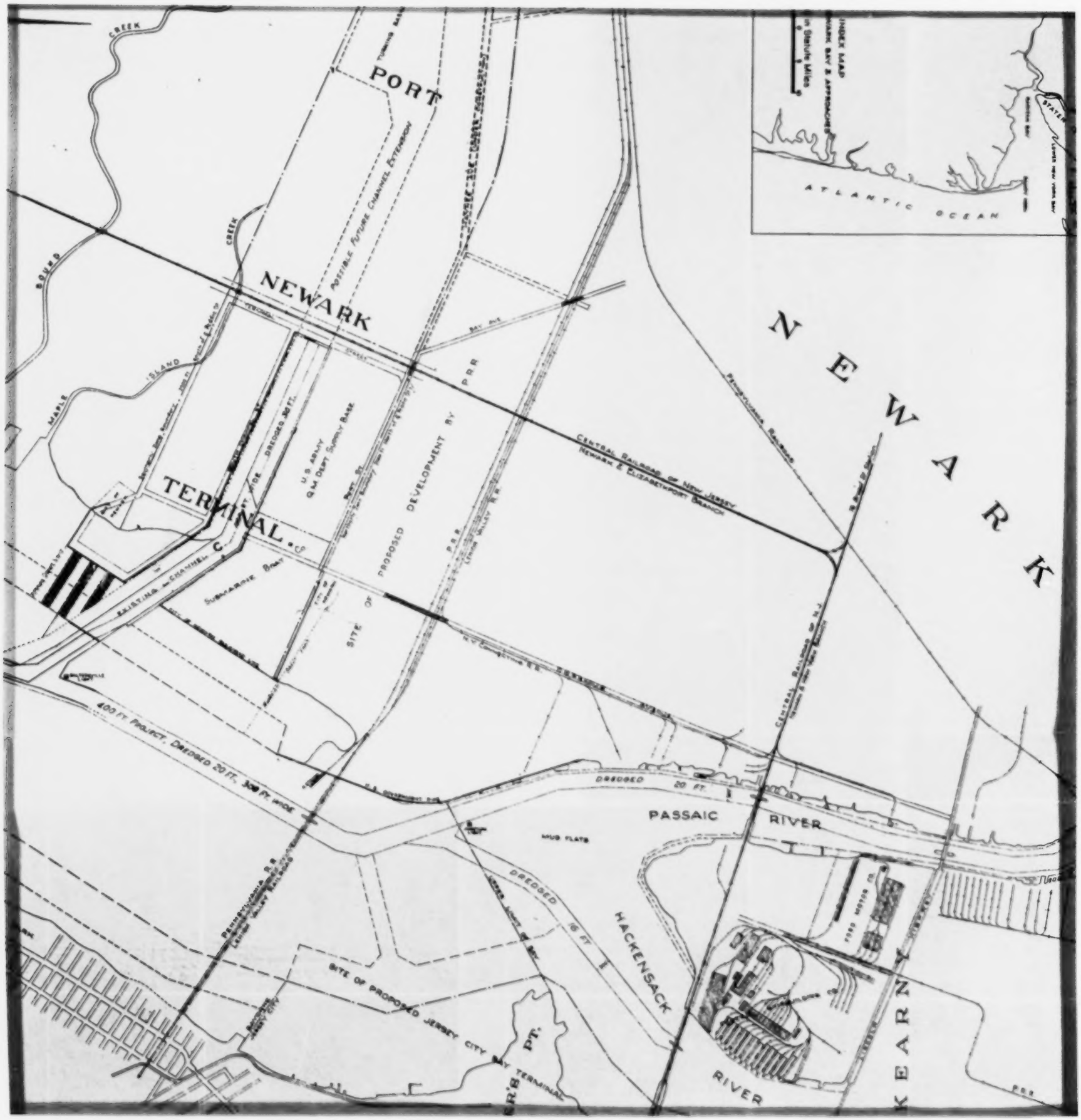

PORT
NEWARK
NEWARK
TERMINAL
PASSAIC
RIVER
HACKENSACK
RIVER
KEARNY
PROPOSED DEVELOPMENT BY P.R.R.
SITE OF PROPOSED JERSEY CITY MY TERMINAL
DREDGED 20 FT.
DREDGED 18 FT.
MUD FLATS
U.S. ARMY Q.M. DEPT SUPPLY BASE
SUBMARINE BASE
EXISTING CHANNEL
400 FT. PROJECT, DREDGED 20 FT., 300 FT. WIDE
PENNSYLVANIA R.R.
CENTRAL RAILROAD OF NEW JERSEY
NEWARK & ELIZABETHPORT BRANCH
INDEX MAP
ATLANTIC OCEAN

Exhibit B.

Motion to Dismiss.

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IN THE

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

[Motion of The Central Railroad Company of New Jersey to Dismiss the Bill of Complaint.]

THE CITY OF NEWARK, *Complainant,*

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al., Defendants.* 158

To:

JEROME T. CONGLETON, Esq., *Solicitor for Complainant.*

Sir:

PLEASE TAKE NOTICE that on Wednesday, the 24th day of January, 1923, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned will apply to the United States District Court at the Federal Building, in the City of Newark, New Jersey, for an order dismissing the bill of complaint filed in the above entitled cause as against the defendant The Central Railroad Company of New Jersey, at the cost of the complainant, upon the ground that said bill of complaint is without equity on its face and does not state any cause of action against said de- 159

160 fendant, and that the Court may not grant the relief prayed for or any part of the same.

Dated, January 15, 1923.

Yours respectfully,

GEORGE HOLMES,
Solicitor for Defendant, The Central Railroad Company of New Jersey.

Answer of Defendant, The Port of New York Authority.

161

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity—No. 4033.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

162

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The Port of New York Authority, by Julius Henry Cohen, its counsel and solicitor, answering the complaint of The City of Newark, complainant herein, alleges:

Answer of Defendant, The Port of New York Authority

I.

It admits the truth of the allegations contained in Paragraphs I, II, III, X and XI.

II.

It admits the truth of Paragraph IV, except that it has no knowledge or information sufficient to form a belief as to the accuracy of the descriptions in said paragraph or the effect of the acts of the Legislature of the State of New Jersey therein referred to, or as to the accurate amount of money which The City of Newark has expended in dredging Newark Bay.

III.

It admits the passage by Congress of the act approved August 8, 1919, 41 U. S. Stats., 277, and the act of March 23, 1906, 34 U. S. Stats., 84, but it has no knowledge or information sufficient to form a belief as to the other allegations in Paragraph VII and prays that this Court determine whether or not "the authority granted to said Railroad Company by the Act of Congress approved August 8, 1919, did cease, expire and become null and void."

IV.

It admits that The Central Railroad Company of New Jersey has maintained a double track wooden bridge with bascule draws across the mouth of Newark Bay, below the City of Newark, between the City of Elizabeth in the County of Union and the City of Bayonne in the County of Hudson, State of New Jersey, and that this said bridge is an obstruction to the navigation of New-

166 ark Bay by vessels seeking the Port Newark Terminal.

V.

It admits that The City of Newark has objected to the construction of a substitute bridge, and has maintained and does maintain that the proper development of the navigation of Newark Bay and of its Port Newark Terminal requires the removal of all bridges at the point set forth in the complaint, but that it has no knowledge or information sufficient to form a belief as to the other
167 allegations contained in Paragraph VI of the complaint.

VI.

It admits the allegations contained in Paragraph IX of the complaint, except that it has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained with reference to applications to the Board of Commerce and Navigation for permits and the denial thereof.

168 VII.

It asks that the Court determine whether "by law" the said new bridge is "a purpresture and a public nuisance."

VIII.

Attached hereto are copies of communications, marked Exhibits E and F, sent to the Secretary of War by The Port of New York Authority. The Port of New York Authority has taken no other

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action than is contained in such communications, except as herein stated.

IX.

The Port of New York Authority has not authorized the construction of the said proposed new bridge of the said Central Railroad Company of New Jersey and has taken no action thereon except as hereinbefore stated. The engineers of the New York, New Jersey Port and Harbor Development Commission and of The Port of New York Authority, in studying the problem of the 170
port and in submitting the Comprehensive Plan, did not make the bridge route a part of any belt line system for the reason, first, that there was so great a density of traffic then and now passing over said bridge, both passenger and freight, that, in the opinion of said engineers, it would be undesirable to utilize said bridge as part of a belt line over which additional traffic could be carried; and, secondly, since the question of removing the said bridge or re-building the same or substituting a tunnel therefor had been under consideration for many years and the matter had not yet been finally disposed of, the engineers were of 171
opinion that the said bridge route should not be made a part of the belt line system. The Port of New York Authority on the 27th day of July, 1922, wrote the War Department the letter of which a copy is hereto annexed, marked Exhibit G. Except as in this paragraph expressly admitted, or as qualified, the defendant denies the allegations of Paragraph XIII.

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X.

The Port of New York Authority has no information sufficient to form a belief as to the truth of the allegations in Paragraphs XIV, XV and XVI of the complaint.

XI.

The Port of New York Authority is advised that the Secretary of War and the Chief of Engineers, on or about the 29th day of December, 1922, did, in writing, approve of the plans of the
173 said The Central Railroad Company of New Jersey for a new bridge across the south end of Newark Bay, replacing the existing bridge at that point. It has no knowledge or information sufficient to form a belief as to the other allegations contained in Paragraph XVII of the complaint.

XII.

The Port of New York Authority has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs XVIII and XIX of the complaint, except
174 that it is advised that the defendant, The Central Railroad Company of New Jersey, has already commenced the construction of the said new bridge.

WHEREFORE, The Port of New York Authority appears herein and prays this honorable Court to determine its legal duties in the premises and states its readiness and willingness to pass upon any application for a permit to build such bridge, if the Court shall determine that, under the acts of the Legislatures of the States of New York and

175

New Jersey and of the Congress of the United States, such permit is required.

JULIUS HENRY COHEN,
Counsel and Solicitor for Defendant,
The Port of New York Authority,
Office and Post Office Address,
111 Broadway, New York City.

EXHIBIT E.

September 8, 1922.

176

Hon. J. M. Wainwright,
Acting Secretary of War,
Washington, D. C.

Dear Sir:

In further acknowledgment of your communication of August 26th (E. D. 41789/242), I beg to advise you as follows:

The Port of New York Authority, after giving very careful consideration to your letter can not see its way clear to act in the capacity that you suggest. The proposed bridge is entirely within the State of New Jersey.

177

There is a State Board in New Jersey, known as the Board of Commerce and Navigation, which has full statutory powers, granted to it by the Legislature of New Jersey, to deal with questions such as the one at issue.

In our judgment, with which on further reflection we are sure you will concur, it would be unwise to create a conflict of authority between two State bodies, as might arise in this case if we followed your suggestion. In any event it could

178 hardly avoid the appearance of passing over a State body specially charged with the supervision of such matters within the State.

We appreciate greatly the confidence and compliment you imply in asking us to act in the manner described. We shall always be glad to be of service to the War Department in any way we consistently can. In this matter, we believe you will agree, it would be better for us not to act.

Very truly yours,

179 (sgd) J. SPENCER SMITH
Vice-Chairman

EXHIBIT F.

December 21st, 1922.

Hon. John W. Weeks,
Secretary of War,
Washington, D. C.

Dear Mr. Secretary:

In the matter of the Central Railroad of New Jersey bridge across Newark Bay, representa-
180 tives of some of the commercial organizations of this port, which are members of the Advisory Council, created under the Port Authority Statutes, called at our office to inquire what action the Port Authority took at the time Colonel H. C. Newcomer of the Board of Army Engineers was requesting opinions on this subject last summer.

We furnished those organizations copies of the letter. In the event that copy of our letter of July 27th to Col. Newcomer, in answer to his communication, may not have reached your office, I am enclosing herein a copy.

Answer of Defendant, The Port of New York Authority

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The Port Authority has taken no subsequent action in this matter.

I remain,

Yours very respectfully,

(sgd) E. H. OUTERBRIDGE
Chairman.

EHO rbh

EXHIBIT G.

July 27th, 1922. 182

War Department,
United States Engineer Office,
Second District,
Colonel H. C. Newcomer,
Room 616, Army Building, 39 Whitehall St.
New York, N. Y.

Dear Colonel Newcomer,

Replying to your circular letter of July 24th, in reference to the application and revised plans of the Central Railroad Company of New Jersey, for a bridge across Newark Bay; Mr. Drinker of our staff has this morning examined the plans in your office. 183

We understand the situation to be that Congress has granted authority for the construction of a new bridge and that the only question before you is the approval of the amended plans submitted by the Railroad Company.

In our opinion the change to 35′ above M. H. W. at closed position, as compared to 13.7′ as previously, will materially facilitate the passage of tugs and lighters without masts. We believe it

184 would be a still further improvement if the lifting spans could be set directly at right-angles to the channel rather than oblique thereto.

I cannot refrain from saying, however, that in our previous careful consideration of this matter we had thought that it would be preferable if no new bridge should be built at this time, or perhaps for a few years, for the following reasons:—

1. The ultimate character of the marine traffic in Newark Bay will be probably very accurately foreshadowed by developments within
185 the next two or three years. If it should be proved that large steamships and masted vessels in substantial numbers are to be operated from Newark Bay, a bridge even as called for in the amended plans might prove a very serious obstruction to navigation.

2. If a large capital expenditure is now made for a new bridge, it would tend to fasten upon Newark Bay perhaps for years the operating conditions entailed by such a bridge, and might thus impose for a long time to come serious limitations upon otherwise possible marine de-
186 velopments and facilities.

3. If after a lapse of two or three years, marine traffic had not developed, of a character to be seriously obstructed by such a bridge, it could then be more safely undertaken.

4. We realize of course the necessity for the railroad to be provided with adequate and proper facilities for its passenger and freight service, but also apprehend that if important marine services developed in Newark Bay, passage for which must be freely and frequently

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permitted, the business of both the railroad and shipping may be seriously incommoded.

5. A large investment of capital by the railroad in a bridge could not be jeopardized or scrapped for a long time to come, probably its physical attributes and operation could not be materially altered. On the other hand, if there should occur a large development of shipping, it would have to be afforded frequent and free access to the ship terminals.

6. We held the view that a brief probationary period of two or three years would probably develop all these facts more clearly than they can be determined today, and therefor enable a wiser judgment as to what ultimate course would be best in the interest of passenger accommodation and trade and commerce.

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Yours very truly,

(sgd) E. H. OUTERBRIDGE
Chairman.

EHO rbh

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190 **Affidavit of William Leary, Read on Behalf of Appellee.**

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

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UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

WILLIAM LEARY, being duly sworn, deposes and says:

1. That he is the Secretary of The Port of New York Authority and has been such ever since its creation under Chapter 154, Laws of New York, 1921, Chapter 151, Laws of New Jersey, 1921, and Public Resolution No. 17-67th Congress.

2. On the 27th day of July, 1922, pursuant to
192 resolutions duly adopted by the Commissioners of The Port of New York Authority, the Chairman addressed to Colonel H. C. Newcomer, United States engineer for the Second District, at his office, Army Building, 39 Whitehall Street, New York City, the letter of which Exhibit A, hereto annexed, is a true copy.

Affidavit of William Leary

3. Under date of August 26, 1922, the Commissioners of The Port of New York Authority received a communication from the War Department, a true copy of which is hereto annexed, marked Exhibit B. 193

4. Under date of September 8, 1922, pursuant to resolution duly adopted, the Commissioners of The Port of New York Authority sent to the Secretary of War a reply to the said communication of August 26, 1922, of which Exhibit C, hereto annexed, is a true copy.

5. On the 20th day of December, 1922, ~~the~~ Chairman was duly authorized to send a letter to the Secretary of War, enclosing a copy of the letter to Colonel H. C. Newcomer of July 27, 1922, Exhibit A, and stating that there was no change in the position of The Port of New York Authority regarding the Central Railroad of New Jersey bridge. That pursuant thereto, the Chairman sent, under date of December 21, 1922, to the Secretary of War a letter of which a copy is hereto annexed, marked Exhibit D. 194

6. I have searched the records of The Port of New York Authority and find that no other action or proceeding has been taken by that body since its organization, and I do so certify. 195

7. No application has at any time been made by The Central Railroad Company of New Jersey or anyone on its behalf for the consent or approval of The Port of New York Authority for the construction of the proposed bridge referred to in the complaint herein and The Port of New York authority has not given its consent or ap-

196 proval to the construction of the said proposed bridge.

WILLIAM LEARY.

Sworn to before me this 18th day of January, 1923.

[NOTARY SEAL] NOTARY EDWARD J. TSCHIMBKE, Notary Public, N. Y. Co. Clerk's No. 106, Reg. No. 4034; Kings Co. Clerk's No. 32, Reg. No. 4008; Bronx Co. Clerk's No. 6, Reg. No. 48; Queens Co. Clerk's No. 829; Richmond County Clerk, Westchester County Clerk and Register,
197 Albany County Clerk, Monroe County Clerk. My term expires March 30, 1924.

[Port of N. Y. Authority Seal.]

EXHIBIT A.

(Copy)

July 27th, 1922.

War Department,
198 United States Engineer Office,
Second District,
Colonel H. C. Newcomer
Room 616, Army Building, 39 Whitehall St.,
New York, N. Y.

Dear Colonel Newcomer:

Replying to your circular letter of July 24th in reference to the application and revised plans of the Central Railroad Company of New Jersey, for a bridge across Newark Bay; Mr. Drinker of our

staff has this morning examined the plans in your office. 199

We understand the situation to be that Congress has granted authority for the construction of a new bridge and that the only question before you is the approval of the amended plans submitted by the Railroad Company.

In our opinion the change to 35′ above M. H. W. at closed position, as compared to 13.7′ as previously, will materially facilitate the passage of tugs and lighters without masts. We believe it would be a still further improvement if the lifting spans could be set directly at right-angles to the channel rather than oblique thereto. 200

I cannot refrain from saying however, that in our previous careful consideration of this matter we had thought that it would be preferable if no new bridge should be built at this time, or perhaps for a few years, for the following reasons:—

1. The ultimate character of the marine traffic in Newark Bay will be probably very accurately foreshadowed by developments within the next two or three years. If it should be proved that large steamships and masted vessels in substantial numbers are to be operated from Newark Bay, a bridge even as called for in the amended plans might prove a very serious obstruction to navigation. 201

2. If a large capital expenditure is now made for a new bridge, it would tend to fasten upon Newark Bay perhaps for years the operating conditions entailed by such a bridge, and might thus impose for a long time to come serious limitations upon otherwise possible marine developments and facilities.

202 3. If after a lapse of two or three years, marine traffic had not developed, of a character to be seriously obstructed by such a bridge, it could then be more safely undertaken.

4. We realize of course the necessity for the railroad to be provided with adequate and proper facilities for its passenger and freight service, but also apprehend that if important marine services developed in Newark Bay, passage for which must be freely and frequently permitted, the business of both the railroad and shipping may be seriously in-
203 commoded.

5. A large investment of capital by the railroad in a bridge could not be jeopardized or scrapped for a long time to come, probably its physical attributes and operation could not be materially altered. On the other hand, if there should occur a large development of shipping, it would have to be afforded frequent and free access to the ship terminals.

6. We held the view that a brief probationary period of two or three years would probably develop all these facts more clearly than they
204 can be determined today, and therefor enable a wiser judgment as to what ultimate course would be best in the interest of passenger accommodation and trade and commerce.

Yours very truly,

(sgd) E. H. OUTERBRIDGE
Chairman.

Affidavit of William Leary

EXHIBIT B. 205

(Copy)

WAR DEPARTMENT.
Washington

August 26, 1922.

The Port of New York Authority,
11 Broadway,
New York City.

Sirs:

There is pending before this Department, the application of the Central Railroad of New Jersey, for authority to construct a new bridge across the southern portion of Newark Bay, to replace the present structure. There are also before this office, protests against the construction of any new bridge at this locality, and requests for the removal of the present structure as being unduly obstructive to navigation in and out of Newark Bay. A new bridge has been authorized by act of Congress, but there is also pending a bill to repeal the authorization for the new bridge. The Central Railroad of New Jersey is anxious to obtain prompt action upon its application because under the law authorizing the construction of the new bridge, work must be commenced by the 15th of February, 1923. 206 207

The opinions expressed on both sides of the question are quite strong and the interests involved are very large, both by water and by land. Although the port of New York is national in its importance and the proper development of the harbor is a matter in which the department of the government charged with harbor improvement must always be actively interested and over which it must exercise control, there are at times de-

208 tails concerning which it desires to know the wishes and preference of the majority of the interests affected, in the community. The continuance of the bridge owned by the Central Railroad of New Jersey will affect the movement of vessels to a certain extent. The removal of the bridge on the other hand, will affect the movement of passengers daily going to New York, and also require considerable adjustment of railroad facilities to meet the change in the freight situation. The costs involved are heavy, whichever way the matter is decided, and after a decision is once made it will be impracticable and inadvisable to
209 change for very many years if, indeed, any change is possible. Under these circumstances, it would appear that the Port of New York Authority, which has under its jurisdiction all the questions of the proper development of New York Harbor, should be the one authority most competent to reconcile, if possible, the conflicting interests, and give a recommendation which will be as nearly satisfactory as possible to all affected.

I therefore, ask the Port of New York Authority to thoroughly investigate this matter, giving full and careful consideration to all interests con-
210 cerned, and make recommendation to the Secretary of War whether the development of the harbor and business affected both by land and by water, will be better served by the construction of a new bridge or by the elimination of any bridge across this portion of the Bay. In submitting your final conclusion and recommendation, I would request that it be accompanied, as an appendix, by such arguments and data as you may have considered in reaching your decision.

Very respectfully,

(sgd) J. M. WAINWRIGHT
Acting Secretary of War.

Affidavit of William Leary

EXHIBIT C. 211

September 8, 1922.

Hon. J. M. Wainwright,
Acting Secretary of War,
Washington, D. C.

Dear Sir:

In further acknowledgement of your communication of August 26th (E. D. 41789/242), I beg to advise you as follows:

The Port of New York Authority, after giving very careful consideration to your letter cannot see its way clear to act in the capacity that you 212
suggest. The proposed bridge is entirely within the State of New Jersey.

There is a State Board in New Jersey, known as the Board of Commerce and Navigation, which has full statutory powers, granted to it by the Legislature of New Jersey, to deal with questions such as the one at issue.

In our judgment, with which on further reflection we are sure you will concur, it would be unwise to create a conflict of authority between two State bodies, as might arise in this case if we followed your suggestion. In any event it could hardly avoid the appearance of passing over a 213
State body specially charged with the supervision of such matters within the State.

We appreciate greatly the confidence and compliment you imply in asking us to act in the manner described. We shall always be glad to be of service to the War Department in any way we consistently can. In this matter, we believe you will agree, it would be better for us not to act.

Very truly yours,

(sgd) J. SPENCER SMITH
Vice-Chairman.

214 EXHIBIT D.

December 21st, 1922.

Hon John W. Weeks,
Secretary of War,
Washington, D. C.

Dear Mr. Secretary:

In the matter of the Central Railroad of New Jersey bridge across Newark Bay, representatives of some of the commercial organizations of this port, which are members of the Advisory Council, created under the Port Authority Statutes, called at our office to inquire what action
215 the Port Authority took at the time Colonel H. C. Newcomer of the Board of Army Engineers was requesting opinions on this subject last summer.

We furnished those organizations copies of the letter. In the event that copy of our letter of July 27th to Col. Newcomer, in answer to his communication, may not have reached your office, I am enclosing herein a copy.

The Port Authority has taken no subsequent action in this matter.

I remain,

216 Yours very respectfully,

(sgd.) EUGENIUS H. OUTERBRIDGE
Chairman.

EHO rbh

Petition and Notice of Motion for Intervention of the State of New Jersey. 217

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Petition—Notice.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, 218
Defendants.

To Jerome T. Congleton, Esq., Solicitor for The City of Newark:

Sir:

PLEASE TAKE NOTICE, that on Wednesday, the twenty-fourth day of January, 1923, at 10:30 o'clock A. M., I shall apply to the Honorable Charles F. Lynch, Judge of the District Court of the United States in and for the District of New Jersey, in equity, for an order permitting 219
the State of New Jersey to intervene in the above entitled cause or be made a party defendant in the bill of complaint therein upon petition, a copy of which is hereto annexed.

Dated, January 19, 1923.

THOMAS F. Mc CRAN
Attorney General of the State
of New Jersey.

Petition for Intervention of the State of New Jersey

220

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Bill for Injunction.—Petition for Intervention on Behalf of the State of New Jersey.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE PORT OF NEW YORK AUTHORITY,

221 *Defendants.*

The petition of the State of New Jersey, by Thomas F. McCran, its Attorney General, petitions and informs the Court that

1. By an Act of the Legislature of the State of New Jersey entitled "An Act to Create the New Jersey Harbor Commission and define its powers and duties", approved April 8, 1914, Chapter 123, a commission was created to be appointed by the Governor, to be known as "The New Jersey Harbor Commission." Section 4 of said Act provided,

222 among other things as follows:

> "All plans for the development of any water front upon any navigable water or stream of this state, or bounding thereon, which is contemplated by any person, corporation or municipality * * * which involves the construction, change, alteration or modification of a * * * bridge * * * shall first be submitted to the said Commission, and no such development or improvement enumerated within the provisions of this section, * * *

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shall be commenced or executed without the approval of this Commission first had and received.

* * * Any development or improvement * * * which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; * * *"

224 By an Act of the Legislature of the State of New Jersey entitled "An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all powers and duties now devolved, by law, upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission," approved April 8, 1915, Chapter 242, a Department of Commerce and Navigation was established, the same to be governed by a board to be known as the Board of Commerce and Navigation, upon which Board was devolved the powers conferred by the Act of 1914 upon the New Jersey Harbor Commission.

225

2. That pursuant to the provisions of the aforesaid statutes, the said The Central Railroad Company of New Jersey on or about the 16th day of February, 1917, made an application to the said Board of Commerce and Navigation for the approval of plans submitted to said Board with said application for the construction of a bridge across the mouth of Newark Bay below the City of New-

226 ark in the County of Essex, between the City of Elizabeth in the County of Union and the City of Bayonne in the County of Hudson, State of New Jersey, to carry the main line of its railroad over Newark Bay. The said Board of Commerce and Navigation, after due consideration of said application, refused such approval on or about the 16th day of April 1917.

The Central Railroad Company of New Jersey thereafter and on or about the 12th day of June, 1918, made a new application to the said Board of
227 Commerce and Navigation for the approval of its said plans and for a permit to carry out the said work, which application, after due consideration thereof, was also refused on or about the 15th day of July, 1918.

The said Central Railroad Company of New Jersey, on or about the 2nd day of February, 1922, made a further application to the said Board of Commerce and Navigation for the approval of its plans and for a permit to carry out the construction of its said bridge, which application also, after due consideration thereof, was on or about the 19th day of June, 1922, refused; that the ap-
228 proval of the said Board of Commerce and Navigation of the plans for the construction of the said bridge has never been obtained.

3. That the said Central Railroad Company of New Jersey has not complied with the provisions of said Chapter 123 of the Laws of 1914 as amended by Chapter 242 of the Laws of 1915 of the State of New Jersey, in that it has not obtained the approval of its plans for the construction of said bridge, and that until it shall procure approval of its plans from the said Board

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of Commerce and Navigation and a permit therefor, any construction of said bridge or any development or improvement in connection therewith is declared by law to be a purpresture and a public nuisance.

4. Your petitioner further says that the defendant, the Central Railroad Company of New Jersey, has already commenced the construction of said new bridge under the pretended authority of a permit issued by the Secretary of War, but without having obtained the approval of its plans for such construction from the Board of Commerce and Navigation or a permit therefor as required by the statutes of the State of New Jersey aforesaid, without which such construction becomes by law a purpresture and a public nuisance.

230

5. That the State of New Jersey is interested in the subject matter of the cause in which this petition is filed, in that said cause is a suit to enjoin the construction of said bridge by the Central Railroad Company of New Jersey, among other grounds because of the failure of said Railroad Company to obtain approval of its plans for the construction of said bridge from the Board of Commerce and Navigation, an agent for the State of New Jersey, in that regard duly authorized and the permit of said Board authorizing said construction.

231

WHEREFORE petitioner prays:

1: That an order be made permitting petitioner to intervene in said cause either as complainant or defendant.

232

2: That writs of subpoena may issue, or an order be made directed to defendants, The Central Railroad Company of New Jersey and The Port of New York Authority, commanding them and each of them to answer, but not under oath, (oath being expressly waived) the allegations contained in this petition, and abide by and perform such orders and decrees as the Court may make in the premises.

3: That the Court adjudge the construction of said bridge without the approval of the plans
233 therefor and without the permission of the Board of Commerce and Navigation of the State of New Jersey to be unlawful and without authority.

4: That temporarily pending this suit, as well as permanently, the defendant, The Central Railroad Company of New Jersey, its officers, agents and servants, and its or their successors and assigns, be enjoined and restrained from proceeding with the construction of said bridge.

5: That this petitioner may have such other and further relief as may be meet and agreeable to equity.

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THOMAS F. McCRAN
Attorney General of the State
of New Jersey.
Solicitor of Petitioner.

Petition for Intervention of the State of New Jersey

235

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

HARRISON P. LINDABURY, being duly sworn, deposes and says:

That he is the legal assistant of the Attorney General of the State of New Jersey, specially assigned as counsel to the Board of Commerce and Navigation, one of the agents of the State of New Jersey; that he has read the foregoing petition and is familiar with the contents thereof; that the matters and things therein set forth, so far as they relate to the acts and deeds of the State of New Jersey and the Board of Commerce and Navigation of New Jersey are true, and so far as they relate to the acts and deeds of others he believes them to be true.

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HARRISON P. LINDABURY.

Subscribed and sworn to before me,
this 19th day of January, 1923.

MAUD A. HORNER,
Notary Public of New Jersey.
My Commission Expires March 22, 1923.

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238 **Order Allowing State of New Jersey to Intervene.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Petition—Order Permitting the State of New Jersey to Intervene.]

THE CITY OF NEWARK,
Complainant,

vs.

239 THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, and THE PORT OF NEW YORK AUTHORITY,
Defendants.

Application having been made by The State of New Jersey by its petition to be permitted to intervene in the above entitled cause on notice to the parties, and the Court having considered said application, it is thereupon, on this twenty-fourth day of January, Nineteen hundred and twenty-three,

240 ORDERED, that the said The State of New Jersey be and it hereby is permitted to intervene in said cause as a party complainant.

CHARLES F. LYNCH,
Judge.

Petition and Notice of Motion for Intervention of the City of Jersey City. 241

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity.]

CITY OF NEWARK, *Complainant*

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, 242
Defendants.

To Central Railroad Company of New Jersey and the Port of New York Authority:

TAKE NOTICE that upon the petition hereto annexed I shall apply on the 24th day of January next at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Honorable Charles F. Lynch, one of the Justices of the United States District Court for an order permitting the petitioner herein to be joined and 243
intervene as a party complainant in the above entitled cause.

AND TAKE FURTHER NOTICE that at the said time and place I shall present the original petition, a true copy of which is hereto annexed, as the basis for said application.

Dated, January 22, 1923.

THOMAS J. BROGAN,
Corporation Counsel.

Petition for Intervention of the City of Jersey City

244

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[Petition for Leave to Intervene.]

CITY OF NEWARK, *Complainant*,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

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To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The Mayor and Aldermen of Jersey City, a municipal corporation of the State of New Jersey, by Thomas J. Brogan, its corporation counsel and solicitor, respectfully shows:

1. That the City of Newark has filed a bill of complaint in this honorable Court, together with
246 a notice of motion for an injunction *pendente lite* against the Central Railroad of New Jersey and the Port of New York Authority.

2. That the City of Jersey City desires to intervene as a complainant in said suit because of its ownership of certain lands fronting upon the Newark Bay and the Hackensack River, which lands and the development with respect thereto, already begun by your petitioner, will be greatly affected by the determination of the subject matter of this suit, and for that purpose adopts as

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its own the allegations of the bill of complaint hereinbefore filed by the City of Newark in the above entitled cause as if it were its own insofar as the allegations therein contained refer to or affect the development of the Newark Bay or the Hackensack River with respect to the location of the proposed bridge by the defendant the Central Railroad of New Jersey.

3. The City of Jersey City has within its territorial limits approximately six miles of shore land fronting upon the Newark Bay and the Hackensack River, said Hackensack River being 248
a continuation, as it were, of the Newark Bay.

4. The City of Jersey City owns in fee approximately 80 acres of said land and has already instructed its law officers to begin condemnation proceedings for the acquisition of additional land fronting on said waterways (Newark Bay and Hackensack River) in pursuance of a plan adopted by the City Commissioners of Jersey City and known as the "Jersey City Development Plan."

5. Your petitioner further shows that it has 249
spent large sums of money in the reclaiming of lands fronting on the Newark Bay, and in addition thereto has appropriated the sum of $650,000 for the erection and construction of wharves and bulkheads in and upon the lands owned by said City.

6. Your petitioner is informed and verily believes it to be true that the erection and construction of the proposed bridge across the mouth of the Newark Bay between the City of Bayonne,

250 in the County of Hudson and State of New Jersey, and the City of Elizabeth, in the County of Union and State of New Jersey, will work irreparable damage and injury to the lands fronting on the Newark Bay and Hackensack River and will result in almost a total waste of the moneys heretofore expended by your petitioner for the proposed development of the water front as laid down on the Jersey City Development Plan.

Your petitioner therefore prays that it may be allowed to intervene in and become a party
251 complainant in said action, and for such other relief in the premises as the nature of the circumstances may require and to this honorable Court shall seem meet and just.

THE MAYOR AND ALDERMEN OF JERSEY CITY.
By THOMAS J. BROGAN,
Corporation Counsel.

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Order Allowing City of Jersey City to Intervene. 253

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity—Order.]

CITY OF NEWARK,

Complainant,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, 254

Defendants.

Application having been made by the Mayor and Aldermen of Jersey City, by its petition, to be permitted to intervene in the above entitled cause and notice of the said application having been given to the defendants, and the court having considered said application, it is thereupon, on this 24th day of January, 1923,

ORDERED that the said Mayor and Aldermen of Jersey City be and it hereby is permitted to intervene in said cause as a party complainant. 255

CHARLES F. LYNCH,
Judge.

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Opinion.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, THE MAYOR AND ALDERMEN OF JERSEY CITY, THE STATE OF NEW JERSEY,
Complainants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and the PORT OF NEW YORK AUTHORITY,
257 *Defendants.*

ON MOTION OF COMPLAINANTS FOR INJUNCTION PENDENTE LITE AND COUNTER-MOTION OF DEFENDANT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, TO DISMISS THE BILL OF COMPLAINT.

JEROME T. CONGLETON, Esq., Solicitor for Complainant City of Newark (GEORGE W. WICKERSHAM, Esq., of Counsel).

THOMAS J. BROGAN, Esq., Solicitor for the Mayor and Aldermen of Jersey City.

258 THOMAS F. MCCRAN, Esq., Attorney General, Solicitor for the State of New Jersey (HARRISON P. LINDABURY, Esq., of Counsel).

GEORGE HOLMES, Esq., and R. V. LINDABURY, Esq., Solicitros for and of Counsel with the Defendant, the Central Railroad Company of New Jersey.

JULIUS HENRY COHEN, Esq., Solicitor for Defendant, the Port of New York Authority.

Opinion

LYNCH, District Judge. 259

The complainants seek to restrain the defendant, the Central Railroad Company of New Jersey (hereinafter referred to as the Railroad Company), from erecting a steel and concrete bridge with bascule draws across the mouth of Newark Bay to take the place of a wooden bridge having bascule draws which the Railroad Company has maintained there for many years. The Railroad Company moves to dismiss the bill of complaint on the ground that it sets up no cause or causes of action. Considering the contents of the bill as admitted, the Court is called upon to deter- 260
mine whether in law a prima facie case is presented. If there is, restraint may issue. If there is not, the bill must be dismissed.

For many years the states, unhampered by Congress, authorized the construction of bridges over navigable waters lying entirely within their confines.

> "From an early date the State has been recognized as the source of authority *in the absence* of action by Congress." *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet., 245, *Escanaba* v. *Chicago*, 107 U. S., 678.

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But it is conceded that such waters are subordinate and subject to the paramount right and authority of the United States under the Federal Constitution. It is for Congress to determine when it will exercise its power. Its mere silence or inaction when a corporation, under the authority of a State, places a structure across a navigable waterway, cannot have the effect of casting upon the Federal Government an obligation not to subsequently exert its constitutional power.

Opinion

262 The waters of Newark Bay at the bridge site are navigable and lie wholly within the State of New Jersey. The existing bridge of the Railroad Company was authorized, constructed and maintained solely by virtue of the authority of an Act of the Legislature of the State of New Jersey approved February 23, 1860, entitled "A Further Supplement to an Act Entitled 'An Act to Incorporate the Somerville and Eastern Railroad Company,' passed February 26, 1847."

In March, 1899 (many years after the bridge was built) Congress adopted what is known as
263 the "United States River and Harbor Act" (30 Stat., 1121), which provides that the *consent* of Congress must be obtained whenever it is planned to build bridges across navigable rivers. This, it is recognized, was an assertion by Congress of its dormant power, and the practice thereafter, upon obtaining authority to construct from the State, was to secure the consent of the Government, as required by this 1899 Act.

This practice continued until 1906 when Congress passed a law entitled "An Act to Regulate the Construction of Bridges Over Navigable Waters." This act, which is commonly known as
264 the "Bridge Act of 1906," provided that whenever *authority is granted by Congress to construct or maintain a bridge* across or over any of the navigable waters of the United States, a bridge shall not be built or commenced until the plans have been submitted to and approved by the Secretary of War; and further that any bridge built in accordance with the provisions of such act *shall be a lawful structure* and shall be recognized and known as a Post Route. In pursuance of this Act of 1906 the Railroad Company has secured the passage by Congress of an act entitled "An

Act to Authorize the Central Railroad Company of New Jersey to construct a bridge across the navigable waters of the Newark Bay, in the State of New Jersey," approved August 8, 1919 (41 U. S. Stat., 277). 265

Did the Act of 1906 have the effect of extending Federal power (the dormant Federal power) so as to exclude all State control?

> "Where there is a conflict the State legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist." *Erie Railroad Company* v. *New York,* 233 U. S., 671. 266

There is only one case that I am aware of in which the effect of the Bridge Act of 1906 has been considered and that is the case of *People* v. *Hudson River Connecting Railroad Corporation* (228 N. Y., 204), which was argued in the Court of Appeals of New York on December 9, 1919. The pertinent facts there were as follows: In *April, 1913,* the New York State Legislature granted the Connecting Railroad the right to construct, maintain and operate a bridge *with more than one span* over the Hudson River at a point 267 where its navigable waters were wholly within the State of New York. In March, 1914, in language identical with the language used in the instant case, Congress granted the Connecting Railroad authority to construct, maintain and operate a bridge and approaches across the Hudson at the same site according to the provisions of the Federal Bridge Act of March, 1906. In *May, 1917,* the plans were approved by the Secretary of War, as required by the Bridge Act. But in *June, 1917,*

268 the New York Legislature *repealed* its law of April, 1913, and passed a law authorizing a bridge *with but one span*—a different kind of a bridge than that authorized by Congress. There being a conflict between the Government and the State, the Court of last resort of the State, by a unanimous vote, decided that Congress in adopting the Bridge Act of 1906 exercised its plenary power and its action excluded any further or other action by the State. I quote from the opinion of Judge ELKUS:

> "What other or higher authority could be
> 269 given to construct a bridge than an Act of Congress stating in terms that such authority is granted? Grant having been made as required by the Bridge Act, the condition governing application of that act has been complied with, and Congress, under its authority over commerce, has declared the bridge to be erected over a navigable stream to be a lawful bridge. Certainly the state cannot make unlawful that which Congress, under its plenary power over interstate commerce, has declared to be lawful. (Cases cited.)
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> * * * * * * * *
>
> The plenary power of Congress under the
> 270 Constitution lies dormant until Congress sees fit to exercise it and in this twilight zone of suspended power the sovereign power of the state is supreme and rights vested during that period under state authority are not subsequently lost when Congress exercises its plenary power, although the entire authority of the state may be superseded as in the cases of bankruptcy and coinage.
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> * * * * * * * *
>
> Congress having declared the bridge proposed to be erected lawful and authorized the defendant to erect same, no authority remained in the state to make any new or other regulations or requirements."

The Attorney General of the State of New York 271
sought a review of this decision in the United States Supreme Court, but a writ of certiorari was denied.

Prior to the decision in the connecting case just referred to there was an allusion to the Bridge Act of 1906 in a decision of the United States Supreme Court in the case of *Union Bridge Company* v. *United States*, argued December 5 and 6, 1906. In that case Justice HARLAN, in reviewing legislation affecting the power of Congress over navigable waters said: "Finally we have the Act of March 23, 1906," but that is all he said about 272
it. An analysis of the Court's lengthy opinion discloses that a construction of this act was not necessary to a determination of the matter which was then before the Court.

The complainants call my attention to the case of *International Bridge Company* v. *New York*, argued in the United States Supreme Court on December 6, 1919, and reargued on October 11 and 12, 1920 (reviewing the Court of Appeals of New York). There was involved there the remodelling of an international bridge between New York and Canada. The international bridge had been authorized originally by the joint action of the State 273
of New York and the Dominion of Canada, with the approval of Congress, and the Supreme Court considered the right of Congress to authorize changes without the concurrence of New York. The original Act of Congress of 1870 mentioned the bridge as being built "in pursuance of" the New York statutes. The Court in considering the *Act of March 3, 1899*, held that that Act did not make Congress the source of the right to build but assumed that the right came from the State.

274 After critically examining all of the legislation which controlled that particular situation the Court stated that it could not discover any intent on the part of Congress to withdraw state control, but that on the contrary there was an assumption that that control (of the State) was to remain. The Act of 1906, the effect of which we are now considering, was not mentioned by Justice HOLMES, who spoke for the Court.

The International Bridge case was later distinguished from the Connecting Bridge case by Judge ELKUS in his opinion in the latter case,
275 *supra*. Referring to the international bridge case he observed that the United States granted nothing to the Bridge Company, but merely *consented* to "'any bridge * * * constructed across the Niagara River * * * in pursuance of the provisions of an act of the Legislature of the State of New York, etc.'"

So the only judicial construction of the Bridge Act of 1906 is contained in the pronouncement of the highest court of a State which unanimously decided that the State may be completely ignored when Congress authorizes a bridge under the authority of that Act; that when Congress so au-
276 thorizes a bridge it *asserts exclusive control* of the situation.

The Railroad Company in the instant case is in a far more advantageous position than was the railroad in the *People* v. *Connecting Railroad* case, *supra*. In the instant case, while the proposed bridge is, in a sense, to be "new," it is in reality but the modernizing of a structure which originally was duly authorized by the State of New Jersey and which has been in continuous use for approximately 60 years.

Opinion

Under the New Jersey Act of February 23, 1860, the Railroad Company was authorized to "construct a bridge." No particular kind of a bridge was specified. Maintaining its bridge under State authority, does it not, in the absence of restrictive or preventive action on the part of the State, possess the right to repair its bridge, or improve it, or, if deemed advisable, *replace it by a modern structure?* In the event of its destruction by fire or otherwise would the Railroad Company not have the right to rebuild it? 277

On this subject the case of *Western Union Telegraph Co.* v. *Polhemus,* 178 Fed., 904, is instructive. In that case the Circuit Court of Appeals for this Circuit was dealing with the planting of renewal *and additional telephone* poles on an admitted right of way in front of property without the consent of the owners thereof. The point decided was that an easement expands to the call of its full enjoyment. Although it was not a railroad improvement with which the Court was concerned, Judge BUFFINGTON, speaking for the Court, took occasion to refer to and approve cases considered by other courts where improvements on railroads were involved. The principle is the same. I quote from his opinion: 278 279

> "Indeed, at an early day, Chief Justice SHAW, in *Brainard* v. *Clapp,* 64 Mass., 6; 57 Am. Dec., 74, held that the easement acquired by a railroad was
>
> > 'an appropriation of the land to all the uses of the land for the road, necessary and incidental; * * * that the right and power of the company to use the lands within their limits may not only be exercised originally, when their road is first laid out, but continues to exist afterwards. And if, af-

280 ter they have commenced operations, it is found necessary,' etc., 'to make further use of the lands, for purposes incident to the safe and beneficial occupation of the road, by,' etc., 'they have the right to do so to the same extent as when the railroad was originally laid out and constructed. All the reasons of necessity, propriety and fitness which apply to the one case are equally applicable to the other.'

And, referring to the broader use of the easement, he says:

'The case of railroads may be regarded as standing on some what stronger grounds
281 in this respect for several reasons: Because railroads are extremely costly, and proprietors cannot in the outset make and complete all the works which they contemplate and intend to make; because these works are comparatively new, and improvements are constantly making in the structure and management of the works, and thus companies may profit by their own experience and that of others; and because an increase in the business of carrying passengers and freight may call for new works after the roads have gone into operation, and these are new exigencies calling for a new use of the land assigned to them.'

282

And this future exercise of easement rights seems to have been generally followed, and was recognized in this circuit in *Lake Shore & M. S. Ry. Co.* v. *New York, C. & St. L. Ry. Co.* (C. C.), 8 Fed., 858, by Judge McKennan, who, where one railroad sought to condemn in part the easement of another, said:

'At the points of the alleged conflict, no actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the pres-

ent necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business.'" 283

And in *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.* (C. C.), 120 Fed., 366, affirmed 195 U. S., 594, 25 Sup. Ct., 150, 49 L. Ed., 362, wherein it is said:

'We deem the question therein mentioned as to the future needs of a railroad in fulfilling its chartered purpose, such as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way.'" 284

Nevertheless, the complainants insist that this "new" bridge cannot be built without the approval of the State Board of Commerce and Navigation and the Port of New York Authority. Has the State, by appropriate action, vested either of these bodies with any power or authority in the premises?

The statutes under which the Board of Commerce and Navigation functions require corporations planning development of water fronts on navigable waters of the State to first secure the approval of the State Board whenever such plans involve the construction, change, alteration or modification of a bridge. I think it is obvious that these statutes, passed many years after the Railroad Company placed its bridge over the bay, were not intended to vest in the State agency thereby created the right to say that a railroad company might not replace its bridge constructed under State authority. How can the replacement of a bridge along a railroad right of way possibly be 285

286 regarded as a plan for the development of water frontage?

And as to the Port Authority—a sort of semi-sovereignty created by the States of New York and New Jersey, with the approval of Congress. It is axiomatic that neither Congress nor the Legislature of a State can delegate its general powers. And the Port Authority, apparently directed by men of vision, has proceeded, so far as endeavoring to secure power is concerned, with commendable caution. In the present situation the Port Authority has not asserted itself in any way. It is
287 brought into court as a defendant and states that if it has any duties to perform in the premises it will gladly perform them. Newark Bay is in the district over which the Port Authority has been given some jurisdiction and the question arises: Has Congress and the State delegated to the Port Authority the power to deal with the Railroad Company's present bridge, or any replacement thereof?

The "Comprehensive Plan" of the Port Authority adopted with the approval of Congress and the New York and New Jersey Legislatures does not provide for the demolition of the Railroad's
288 present wooden bridge, nor for the demolition of the Brooklyn bridge, or the Williamsburg bridge, or the 59th Street bridge, or the Pennsylvania Railroad, Lackawanna Railroad, Erie Railroad or Hudson "Tube" Railroad bridges which cross the Hackensack and Passaic rivers, or so far as I can discover, the demolition of any existing structures now carrying interstate traffic over navigable waters lying in the territory allotted to the Port Authority. The district of the Port Authority runs as far north as Irvington on the Hudson,

New York, as far east as Long Beach, Long 289
Island, as far south as Atlantic Highlands and as far west as Summit, New Jersey. There are maintained at present in this district all sorts of bridges over navigable waters, not only railroad bridges but also bridges designed to accommodate other modes of vehicular traffic. An examination of the statutes under which the Port Authority operates discloses no present authority to do away with any of these structures.

While Congress and the interested State Legislatures are contributing their support to the improvement of transportation facilities by the Port 290
Authority, none of those bodies has, nor has the Port Authority itself, yet attempted to attack the existing rights of corporations operating structures originally authorized by law. The fact that the use of this bridge is not contemplated in the present comprehensive plan of the Port Authority does not mean that it cannot be included therein. There is nothing to prevent an alteration of the comprehensive plan. There is nothing to prevent its complete abandonment. By appropriate action the Railroad's bridge could be made a part of it. And the fact that it (this bridge) is not now a part of it does not mean that it is, or that a 291
new structure in its place would be, an unlawful structure.

That Congress has not attempted to divest itself of its jurisdiction over the situation may be gathered from a reading of the Public Resolutions of Congress referred to in the bill of complaint (42 U. S. Stat.), wherein it is provided "that nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over

292 the region which forms the subject of said agreement."

I am of the opinion that the Port Authority is not now possessed of authority to proceed against this lawful bridge, but if it were and should desire to take affirmative action, it would undoubtedly first avail itself of the following provisions of Article XIII of the compact creating it which provides that:

> "The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in Article X for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein."

293

294 As I indicated at the outset, this Court is called upon to decide legal questions only—questions which have no relation whatever to the policy or advisability of fastening a steel and concrete structure across the mouth of this bay where, according to the bill, it appears that commercial activity is likely to increase. In my opinion these legal questions all resolve themselves one way. If, as was decided in the *Connecting Railroad* case, *supra,* Congress in passing the Bridge Act of 1906 undertook the sole and exclusive control

of situations such as here, the complainants are 295
without a case. If, on the other hand, the Bridge Act of 1906 merely provided for the consent of Congress to a bridge duly authorized by a state, the complainants are likewise without a cause for action, for, as I have already pointed out, the railroad company has the unimpaired State authority to maintain its bridge at this crossing. It has the sanction of both the State and the Federal Government.

It is my conclusion that the complainants have presented no *prima facie* case and it therefore becomes my duty to dismiss the Bill of Complaint. 296

Final Decree Appealed From.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Bill, etc.]

THE CITY OF NEWARK, the MAYOR and ALDERMEN OF JERSEY CITY, THE STATE OF NEW JERSEY,
Complainants, 297

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

This cause came on to be heard on the motion of complainant, The City of Newark, for an injunction *pendente lite* to restrain the defendant, The Central Railroad Company of New Jersey,

298 from constructing the bridge described in the bill of complaint, the Mayor and Aldermen of Jersey City and the State of New Jersey, having been admitted as co-plaintiffs in the cause by order entered herein, united in the said motion, and the defendant, The Central Railroad Company of New Jersey, having moved to dismiss the bill of complaint as against it, and the cause having been fully argued by counsel, and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that the motion of the defendant, The Central Railroad Company
299 of New Jersey, to dismiss the bill of complaint herein as against it for want of equity be and the same hereby is granted, and that the said bill of complaint be and the same hereby is dismissed as against the defendant, The Central Railroad Company of New Jersey, for the cause aforesaid, and it is further

ORDERED, that the motion for an injunction be and the same is hereby denied for want of equity in the said bill of complaint, and it is further

ORDERED, that the said defendant, The Central Railroad Company of New Jersey, recover its
300 costs to be taxed.

Dated February 23rd, 1923.

CHARLES F. LYNCH,
U. S. D. J.

Petition for Appeal and Notation of Allowance. 301

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, THE MAYOR AND ALDERMEN OF JERSEY CITY and THE STATE OF NEW JERSEY,
Complainants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, and THE PORT OF NEW YORK AUTHORITY, 302
Defendants.

To the Honorable the Judges of Said Court:

Now come the above named complainants, by their respective solicitors, and feeling themselves severally aggrieved by the final decree of this Court, entered on the 23d day of February, 1923, hereby pray that an appeal be allowed to them from the said decree to the Circuit Court of Appeals for the Third Circuit and in connection with this petition petitioners herewith present their assignment of errors. 303

JEROME T. CONGLETON,
Solicitor for Complainant The City of Newark.

THOMAS J. BROGAN,
Solicitor for Complainant The Mayor and Aldermen of Jersey City.

H. P. LINDABURY,
Special Counsel for Attorney-General Solicitor for Complainant, The State of New Jersey.

Appeal allowed.

(Signed) CHARLES F. LYNCH,
District Judge.

304 **Assignment of Errors.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, THE MAYOR AND ALDERMEN OF JERSEY CITY, and THE STATE OF NEW JERSEY,
Complainants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
305 *Defendants.*

Now come the complainants, The City of Newark, The Mayor and Aldermen of Jersey City and The State of New Jersey, by their several solicitors, and in connection with their petition for appeal say that in the record, proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of the complainants, to-wit:

306 (1) That the Court erred in denying the motions of the complainants for an injunction restraining the defendant The Central Railroad Company of New Jersey from erecting a bridge across the mouth of Newark Bay as described in the Bill of Complaint herein.

(2) That the Court erred in holding that the defendant The Central Railroad Company of New Jersey was authorized to construct the bridge described in the bill of complaint without the approval of the State Board of Commerce and Navigation of the State of New Jersey.

(3) That the Court erred in holding that the defendant The Central Railroad Company of New Jersey is authorized to construct the said proposed bridge without the approval of the Port of New York Authority. 307

(4) That the Court erred in holding that the complainants had presented no *prima facie* case, and therefore, that the bill should be dismissed.

(5) That the final decree entered as aforesaid is contrary to law.

WHEREFORE, complainants severally pray that the final decree of the District Court of the United States for the District of New Jersey dismissing the bill of complaint for want of equity be reversed, and that the order denying the motion of complainants for an injunction *pendente lite* be reversed, and that the cause may be remitted to the District Court with instructions to reinstate the bill and grant the injunction *pendente lite* as prayed by the complainants, respectively. 308

JEROME T. CONGLETON,
Solicitor for Complainant The City of Newark.

THOMAS J. BROGAN, 309
Solicitor for Complainant The Mayor and Aldermen of Jersey City.

H. P. LINDABURY,
Special Counsel for Attorney-General, Solicitor for Complainant, The State of New Jersey.

Stipulation Re Appeal Record.

310 UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.
[No. 4033—In Equity.]

THE CITY OF NEWARK,
Complainant-Appellant,

THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Intervenors-Appellants,
against

311 THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants-Appellees.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court, District of New Jersey, in the above-entitled matter, as agreed upon by the parties.

Dated, April 17, 1923.

JEROME T. CONGLETON,
Solicitor for The City of Newark, Complainant-Appellant.

312 THOMAS F. McCRAN,
Attorney General, Solicitor for The State of New Jersey, Intervenor-Appellant.

THOMAS J. BROGAN,
Solicitor for The City of Jersey City, Intervernor-Appellant.

GEORGE HOLMES,
Solicitor for The Central Railroad Company of New Jersey, Defendant-Appellee.

JULIUS HENRY COHEN,
Solicitor for The Port of New York Authority, Defendant-Appellee.

Clerk's Certificate.

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UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[No. 4033—In Equity.]

THE CITY OF NEWARK,
Complainant-Appellant,

THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Intervenors-Appellants,

314

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants-Appellees.

I, GEORGE T. CRANMER, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the foregoing printed record is the transcript of the record of said District Court in the above-entitled matter, as agreed upon by the parties.

315

IN TESTIMONY WHEREOF I have caused the seal of said Court to be hereunto affixed in the City of Newark this 17th day of April, in the year of our Lord, the One thousand nine hundred and twenty-third, and of the Independence of the United States the One hundred and forty-seventh.

GEORGE T. CRANMER,
Clerk.

By CHARLES S. CHEVRIER,
Deputy.

[SEAL OF THE DISTRICT COURT]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION

And afterwards, to wit, on the second day of October, 1923, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

OPINION—Filed February 29, 1924

DAVIS, Circuit Judge:

This is an appeal from a decree of the District Court denying a preliminary injunction and dismissing the bill filed by the City of Newark. The City of Jersey City and the State of New Jersey intervened as parties complainant. The object of the bill was to restrain the Central Railroad Company of New Jersey from building a draw-bridge across the mouth of Newark Bay below the City of Newark, between the City of Elizabeth in Union County and the City of Bayonne, in Hudson County, New Jersey, to replace a draw-bridge constructed at about the same location shortly after 1860, and since then maintained by that Company, pursuant to an act of the legislature of New Jersey approved February 23, 1860 (P. L. 1860 C. 64). This Act authorized the construction of a bridge "with a pivot draw with two openings, each of seventy five feet in width, at right angles to the main channel."

By an Act of the Legislature of New Jersey approved April 8, 1914, (P. L. 1914 Ch. 12 3) a Harbor Commission was created which provided in section 4 that all plans involving the construction, change, alteration or modification of any bridge over any navigable water or stream of that State would first be submitted to the Harbor Commission and that no such work should be commenced or executed without its approval and any work commenced without its approval was declared to be a purpresture and public nuisance.

The States of New York and New Jersey by agreement created thereafter, in 1921, a district known as the Port of New York District, which embraces among other places all the waters of Newark Bay, including the location of the proposed new bridge. It also

created a joint commission known as the Port of New York authority. This body consists of three commissioners from each State and is a nominal defendant. It has adopted "a comprehensive plan for the development of the Port of New York". This plan includes Newark Bay over which the bridge is to cross, but the bridge does not appear upon this plan. The Port Authority filed an answer in which it asked the Court to "determine whether 'by law' the said new bridge is 'a purpresture and a public nuisance'". Not being convinced of its legal duties it appeared in effect as amicus curiæ and prayed the Court to "determine its legal duties in the premises".

By virtue of an Act of the Legislature of New Jersey approved April 8, 1915 (P. L. 1915, Ch. 242), the duties of the Harbor Commission devolved upon the Board of Commerce and Navigation. Three times, February 16, 1917, June 12, 1918 and February 2, 1922, the Railroad Company applied to the Board of Commerce and navigation for approval to construct the proposed bridge across Newark Bay but the Board denied the applications.

The defendant company secured the passage by Congress on August 8, 1919, (41 Stat. 277) of an Act giving it authority to construct, maintain and operate the proposed draw-bridge in accordance with an Act of Congress entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906 (34 Statute 84). This is the general bridge act under the authority of which all bridges have since its passage been built. Subsequent acts authorize the construction of particular bridges in accordance with the general provisions of this Act which requires any bridge built pursuant to its authority to be commenced within one year and completed within three years from the date of the approval of the act authorizing the construction. The bridge in question was not commenced within one year and so the authority given to the defendant company expired and became null and void on August 8, 1920. The defendant secured the passage by Congress of another Act, approved February 15, 1921, extending the times for commencing and completing the construction of the bridge, authorized by the Act of Congress approved August 8, 1919, two and five years respectively from the date of the approval of the Act.

The Act of March 23, 1906, supra, further provides that when authority is granted by Congress to construct and maintain a bridge across any navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings and map of the proposed construction, and location as may be required for a full understanding of the subject, have been submitted to and approved by the Secretary of War and Chief of Engineers. The defendant submitted the required plans and specifications, drawings and may to the Secretary of War and Chief of Engineers and secured their approval. It has commenced the construction of the bridge in accordance with these plans.

The City of Newark alleges that it owns certain real estate and riparian rights appurtenant thereto located on the Westerly side of

Newark Bay which is a navigable tidal body of water lying wholly within the State of New Jersey; that the City is engaged in improving this real estate for transportation, shipping and other industrial purposes; that the bridge maintained for many years at the locus in quo by the defendant has been, and the proposed new bridge will be, a serious obstruction to the navigation of Newark Bay by ocean-going steamers and sailing crafts and that the proposed new bridge is obstructive of and inimical to the comprehensive development planned by the States of New York and New Jersey in the Port of New York District. The City of Jersey City avers that it owns lands above the bridge on Newark Bay and the Hackensack River and joins in the allegations of the City of Newark. The State of New Jersey alleges that the defendant has not obtained the approval of the State Board of Commerce and Navigation. They contend that since the approval of this Board was not obtained by defendant, the proposed bridge will constitute a purpresture and public nuisance and that the action of the secretary of War and Chief of Engineers in approving the bridge is arbitrary and void because the Act of Congress, authorizing the construction of the bridge without the approval of the State of New Jersey, violates the rights guaranteed to complainants by the Fifth and Tenth Amendments to the Federal Constitution.

The amendments invoked declare that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation, and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

The complainants contend that these Amendments require that the concurrent consent of both State and Federal Government be obtained before a bridge over navigable waters wholly within one State may be lawfully constructed. Disregarding at present the contention of the respondent that the waters in question are not wholly within the State of New Jersey, is the proposition sound? The decision of this case depends upon the answer to this question. The State of New Jersey refused to give its consent and if that consent is necessary before the bridge may be lawfully built the will of the State, and not that of the Federal Government, is supreme.

It has many times been declared by the Supreme Court that when Congress enters the field of regulation and speaks, state regulation is excluded because of the paramount authority of Congress, provided it has spoken on a subject over which it has jurisdiction. The Constitution provides that, "The Congress shall have power, to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is thus seen that power to regulate commerce among the several States is expressly delegated to the United States by the Constitution in the most general and absolute terms. This power extends to the regulation of commerce on both land and water, to the control of the navigable waters of the country and the lands under them and to the erection of piers, bridges and all other instrumentalities of commerce which,

in the judgment of Congress, may be necessary or expedient for the exercise of this power. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U. S. 421; Erie Railroad Company v. New York, 233 U. S. 671. This power is unrestricted except by constitutional limitations. Scranton v. Wheeler, 179 U. S. 141; Philadelphia Company v. Stimson, Secretary of War, 223 U. S. 605. If it "regulates commerce with foreign nations, and among the several states, and with the Indian Tribes," the power of Congress is supreme and is not rendered impotent by anything that a State may or can do. Economy Light Co. v. United States, 256 U. S. 113, 121. It is admitted that this bridge is to serve interstate commerce and Newark Bay is navigable. The regulation of commerce is the object of the Constitutional care and the source of Congressional power to regulate navigation and navigable streams. Stockton, Attorney General of New Jersey v. Baltimore & N. Y. R. Co., 32 Fed. 9. Whether the waters are wholly within the boundaries of one State or lie between or extend into two States is immaterial. Decker v. Baltimore & N. Y. R. Co., 30 Fed. 723.

From an early date it has been recognized that a State has power to authorize the construction of a bridge over navigable waters within its borders. Wilson v. Black-Bird Creek Marsh Co., 27 U. S. 244. Escanaba Company v. Chicago, 107 U. S. 678. Until the dominant power given by the Constitution is exercised by appropriate legislation, the power of the States is plenary. But when the power of the State and Federal Government come in conflict, the latter must control and the former yield. Escanaba Company v. Chicago, supra. Congress may or may not, just as it chooses, exercise its power over navigable streams.

The case of International Bridge Co. v. New York, 254 U. S. 126 is largely relied upon by appellants. But in that case, the United States had not exercised the power of eminent domain. The bridge between Squaw Island in the Niagara River and the mainland of the State of New York was built "in pursuance of the statutes of the State of New York." State authority, therefore, was the source of the Company's power. The Court said: "When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw State control, but on the contrary an assumption that the control is to remain." Congress in that particular case did not choose to exercise the power of exclusive control but left it to the State. And so the court left the power of control just where Congress left it. But that Congress does not have absolute, exclusive control, when it chooses to exercise it, is a very different proposition. If the consent of a State were necessary before a bridge could be built over navigable waters within its borders, the power of regulating commerce among the States and with foreign nations would reside in the States and not in Congress. In the case at bar, Congress has authorized the Construction of the bridge notwithstanding the opposition of the State of New Jersey. Its power to do this was plenary and may not be inter-

fered with by that State. Williamette Bridge Co. v. Hatch, 125 U. S. 1, 12; Prigg v. Commonwealth of Pennsylvania, 41 U. S. 539, Luxten v. North River Bridge Co. 153 U. S. 525; Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439; Economy Light Co. v. United States, 265 U. S. 113, 121; People v. Hudson River Railroad Corporation 228 N. Y. 203, 254 U. S. 631.

The cases relied on and cited by complainants do not establish a contrary doctrine. In the case of Louisville & Nashville Railroad Company v. Kentucky, 161 U. S. 677, counsel quotes part of the opinion on page 702, to the effect that the power of Congress over interstate commerce did not take from the States the power of legislation with respect to the instruments of such commerce. From this statement it is argued that the consent of New Jersey is necessary before the bridge may be legally constructed. But the court in speaking of the power of Congress, described it as the "dominant power of Congress" and a little further on in the same paragraph from which counsel quoted says: "In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith." Congress has always reserved to itself the superior and exclusive right to regulate commerce among the several States and every time that the Supreme Court has squarely met the question, it was in no uncertain language declared that the power of Congress to regulate the construction of bridges over navigable waters of the United States is dominant. When, therefore, Congress acted in the instant case, its powers was plenary, supreme and exclusive.

The decree of the District Court is affirmed.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the District of New Jersey

JUDGMENT—Filed February 29, 1924

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, February 29, 1924.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR APPEAL and ORDER ALLOWING SAME—Filed March 28, 1924

To the Honorable the United States Circuit Court of Appeals for the Third Circuit:

And now come The City of Newark, The City of Jersey City, and The State of New Jersey, by Jerome T. Congleton, Thomas J. Brogan and Henry J. Gaede, their respective solicitors, and conceiving themselves aggrieved by the final decree of this Court made and entered in the above entitled cause the 29th day of February, 1924, pray that an appeal therefrom may be allowed them to the Supreme Court of the United States for the reasons specified in their Assignment of Errors presented herewith; and the appellants aforesaid pray that the transcript of record of the proceedings herein upon which the said final decree of February 29, 1924, was made, together with the said decree and the opinion of the court, may be duly authenticated and sent to the said Supreme Court of the United States.

And the appellants aforesaid pray that a cash deposit of Two hundred and fifty dollars ($250) may be deemed sufficient to act as a supersedeas herein, no funds or other property of the appellees being now in the possession of the appellants so as to require the protection of a bond and no party hereto being now held under injunction.

And the appellants show that they are entitled to this appeal under Section 241 of the Act of Congress of March 3, 1911, as amended, known as the Judicial Code for that the decree of this court aforesaid is not made final by the provisions of Section 128 of the Act aforesaid.

And appellants further pray that the mandate to issue herein on the aforesaid order of February 29, 1924, be stayed until the further order of this court.

Dated, Newark, New Jersey, March 27, 1924.

Jerome T. Congleton, Solicitor for Appellant The City of Newark. Thomas J. Brogan, Solicitor for Appellant The Mayor and Aldermen of Jersey City. Henry J. Gaede, Special Counsel for Attorney General, Solicitor for Appellant The State of New Jersey. George W. Wickersham, of Counsel.

The appeal herein prayed in the above stated cause is hereby allowed and the payment into court of cash money in lieu of a bond is approved.

J. Warren Davis, Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 28, 1924

And now come the appellants The City of Newark, The City of Jersey City, and The State of New Jersey, and in connection with their petition for appeal say that in the record of proceedings herein and in the final decree herein made and entered the 29th day of February, 1924, manifest error hath intervened to the prejudice of the appellants, to-wit:

1. The court erred in denying the motions of the appellants for an injunction restraining the defendant, The Central Railroad Company of New Jersey, from erecting a bridge across the mouth of Newark Bay, as described in the bill of complaint herein.

2. The court erred in holding that the defendant, The Central Railroad Company of New Jersey, was authorized to construct the bridge described in the bill of complaint without the approval of the State of New Jersey.

3. That the court erred in holding that the defendant, The Central Railroad Company of New Jersey, was authorized to construct the bridge described in the bill of complaint without the approval of the State Board of Commerce and Navigation of the State of New Jersey.

4. The court erred in holding that the Congress of the United States had power under the Constitution to authorize the construction of the bridge described in the bill of complaint without the approval thereof by the State of New Jersey or by the State Board of Commerce and Navigation of the State of New Jersey, and/or by the Port of New York Authority.

5. The court erred in so construing the Act of Congress, approved March 23, 1906, and known as the Bridge Act of 1906, as to make the authorization of said Act sufficient for the construction of a bridge over navigable waters wholly within one state, and to render the authorization thereof by such state unnecessary.

6. The court erred in holding that there had been an exercise of the power of eminent domain by the United States in connection with the bridge described in the Bill of Complaint.

7. The court erred in refusing to hold that the concurrent assent of both the state and the federal government is necessary before a bridge over navigable waters wholly within one State may be lawfully erected.

8. The court erred in refusing to hold that the source of power to construct a bridge over navigable waters wholly within the confines of one state is in the state itself.

9. The court erred in holding that the defendant Railroad Company's motion to dismiss was properly granted.

10. The court erred in affirming the order of the United States District Court for the District of New Jersey appealed from.

11. The final decree entered February 29, 1924, is contrary to law.

Dated, Newark, New Jersey, March 27, 1924.

Jerome T. Congleton, Solicitor for Appellant The City of Newark. Thomas J. Brogan, Solicitor for Appellant The Mayor and Aldermen of Jersey City. Henry J. Gaede, Special Counsel for Attorney-General, Solicitor for Appellant The State of New Jersey. George W. Wickersham, of Counsel.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

DESIGNATION OF RECORD—Filed March 28, 1924

The Clerk will please prepare a transcript of record herein to consist of the following:

1. The transcript of record herein on appeal from the final decree of the United States District Court for the District of New Jersey, dated February 23, 1923, to the United States Circuit Court of Appeals for the Third Circuit.

2. The minute entry as to argument.

3. The opinion of the United States Circuit Court of Appeals for the Third Circuit herein, per Hon. J. Warren Davis, United States Circuit Judge.

4. The final decree herein of the United States Circuit Court of Appeals for the Third Circuit made and entered the 29th day of February, 1924.

5. The petition for appeal to the Supreme Court of the United States.

6. The assignment of errors accompanying the foregoing petition for appeal.

7. The order allowing appeal and approving deposit in lieu of bond.

8. Citation on appeal.

9. This designation of record.

Dated, Newark, New Jersey, March 28, 1924.

Jerome T. Congleton, Solicitor for Appellant The City of Newark. Thomas J. Brogan, Solicitor for Appellant The Mayor and Aldermen of Jersey City. Henry J. Gaede, Special Counsel for Attorney-General, Solicitor for Appellant The State of New Jersey.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

CLERK'S CERTIFICATE

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of: City of Newark, et al., Appellants, vs. Central Railroad of N. J., et al., Appellees, No. 2998, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 31st day of March in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of United States Circuit Court of Appeals, Third Circuit.)

Citation in usual form showing service on J. H. Cohen & George Holmes omitted in printing.

[File endorsement omitted.]

Endorsed on cover: File No. 30,243. U. S. Circuit Court of Appeals, Third Circuit. Term No. 933. The City of Newark, The City of Jersey City, and The State of New Jersey, appellants, vs. The Central Railroad Company of New Jersey and the Port of New York Authority. Filed April 3rd, 1924. File No. 30,243.

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